93-524
No.

Supreme Court, U.S.
FILED
SEP 30 1993
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

THE LONG ISLAND RAIL ROAD COMPANY,

*Petitioner,*

vs.

JOHN BATES, JAMES BUTLER, ANTONIO SALVA, MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is an action brought by a railroad worker alleging disability discrimination under Section 504 of the Rehabilitation Act, which involves a "minor dispute" under Section 3 of the Railway Labor Act, in that its resolution requires interpretation of certain provisions of the railroad collective bargaining agreement created pursuant to Section 2 of the Railway Labor Act, subject to compulsory arbitration pursuant to the mandatory requirements of Section 3 of the Railway Labor Act which make arbitration the exclusive remedy for settling "minor disputes"?

2. If a litigant induces his adversary to settle a lawsuit in open court with the trial judge's

participation after asserting throughout the course of the lawsuit and in trial testimony that he is permanently unable to perform the essential requirements of his job, does the doctrine of judicial estoppel preclude the litigant from maintaining a subsequent lawsuit against the same adversary which turns on contradictory assertions?

## LIST OF PARTIES

The Petitioner herein is The Long Island Rail Road Company, which is a subsidiary of the Metropolitan Transportation Authority.

The Respondents herein are John Bates, James Butler, Antonio Salva, and Malachy Lyons, Jr.[1]

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[1] There were five other parties involved as plaintiffs and appellants in the courts below. The claims of three -- Vincent Gonzalez, Henry Robinson and Alan Wayne -- were dismissed on statute of limitations grounds and the claims of the remaining two -- Flossie Horsey and Joseph Abrams -- were dismissed for failure to establish a prima facie case. Petitioner does not seek to appeal these dismissals. Therefore, these five individuals are not included herein as parties as they no longer have an interest in this action.

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JOHN BATES, JAMES BUTLER, ANTONIO SALVA and MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner, The Long Island Rail Road Company, ("LIRR"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered July 2, 1993.

## OPINIONS BELOW

The District Court's opinions are not reported (E.D.N.Y September 25, 1991; September 21, 1992). The Court of Appeals' opinion is reported at 997 F.2d 1028 (2d Cir. 1993).

## JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1993. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

29 U.S.C. § 794.

45 U.S.C. § 151 et seq.

## STATEMENT OF THE CASE

Respondents John Bates, James Butler, Antonio Salva and Malachy Lyons, Jr. brought this action under § 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794, alleging that LIRR violated their rights under the provisions of their respective

collective bargaining agreements and wrongfully terminated them on the basis of their respective disabilities.

LIRR is a recipient of federal financial assistance and a carrier within the meaning of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq. Pursuant to the RLA, LIRR has negotiated with the various unions representing its employees and they have entered into collective bargaining agreements which establish the terms and conditions of employment of the covered employees.

All of the respondents were union members covered by such collective bargaining agreements. Under each of the relevant collective bargaining agreements, LIRR has the right to summarily (administratively) terminate employees for non-disciplinary reasons in certain circumstances, including physical disqualification. The agreements also

provide that jobs are assignable through bidding on the basis of seniority, therefore, an employee could be "bumped" from his or her position by a more senior employee at any time (A4)[2]. Further, the agreements provide for the grievance of disciplinary matters and of any "injustice...with respect to any matter...other than discipline" (RA566;577;659-60).[3]

Each year, many LIRR employees receive work-related injuries. LIRR's policy, implemented primarily through its Disability Management Department and Medical Facility, is to return them to work as soon as possible (A4;RA182).

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2 References to "A__" are to the Court of Appeals' opinion which is reproduced in Appendix A to this Petition.

3 References to "RA__" are to the Joint Appendix submitted on the appeal to the Second Circuit Court of Appeals.

Some injured employees settle their resulting claims in-house with LIRR's Claims Bureau. Others pursue their rights under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq. In 1987, the year in which this action was commenced, LIRR paid a total of $7,718,226.47 on such claims and suits (RA80).

Under the various collective bargaining agreements, employees who suffer work-related injuries may take unlimited sick leave at full pay and their time out is not counted against their time accrued for sick leave purposes pursuant to the agreements. While evidence of their lost time is admissible in the trial of their FELA suits, the fact that they received full pay is not. Consequently, unscrupulous employees have been encouraged to abuse the system by malingering during the pendency of their

FELA suits, claiming to be permanently unable to perform the essential functions of the jobs they held at the time they sustained injury, only to recover miraculously and demand reinstatement soon after securing a verdict or settlement in the FELA suit.

All of the respondents alleged that they suffered on-the-job injuries in varying degrees, and thereafter refused to work, claiming to be permanently unable to perform the requirements of the positions they held at the time they sustained injuries. They all brought FELA actions against LIRR and recovered awards of varying amounts after verdict or through settlement. They all were administratively terminated by LIRR. Respondents Bates, Salva and Lyons exhausted their mandatory grievance and arbitration remedies under their collective bargaining agreements and the

RLA. As a result, their terminations were upheld. Respondent Butler grieved his termination to the highest available level within LIRR, where his termination was also upheld, but he did not thereafter proceed to arbitration. Because the remaining facts as to each respondent vary they are set forth separately, as follows:

JOHN BATES:

John Bates was employed by LIRR as a pipefitter, and as such, was a member of the Sheet Metal Workers International Association, United States District Council for Railroads ("SMW").

He injured his left ankle and wrist on the job on December 2, 1981 and consequently sued LIRR under the FELA seeking One Million Dollars. He alleged in the FELA complaint that he was permanently disabled from performing his "usual occupation." He stopped working

on December 21, 1981 and never returned. His treating physicians and LIRR's Medical Director concurred that he was permanently unable to do so.

In January 1985, during the FELA jury trial, Bates' treating physician testified that Bates was permanently disabled from performing the duties of a pipefitter or any other job in the same craft because his ankle injury prevented him from performing the essential job requirements - walking, climbing, carrying or standing - even if he wore a leg brace. Bates' doctor further testified that it would do no good to "accommodate" Bates (RA284-92).

Bates himself testified that he had explored the possibility of bidding for another job in his craft but was unable to identify one for which he was physically qualified (RA296). In fact, in early 1985, LIRR had on two occasions

attempted to place Bates in a more sedentary position covered by his collective bargaining agreement. He was not able to perform either of them (RA1467,1496).

On January 22, 1985, the FELA jury awarded Bates $450,000 in damages, reduced 50% for his own negligence. Three weeks later, LIRR's Medical Director examined Bates and concluded that his condition was unchanged and he was permanently disabled from performing sheet metal work. On April 15, 1985, LIRR administratively terminated him on the basis of his medical disqualification, and his successful assertions of permanent disability during the FELA trial. Through the SMW, he grieved and arbitrated his termination in accordance with the SMW/LIRR collective bargaining agreement and the RLA and his termination

was upheld on judicial estoppel grounds (RA824-39).

Bates submitted an affidavit in opposition to LIRR's motion for summary judgment in the District Court which stated that a doctor examined him in late 1985 and found him able to perform the essential functions of his job. The District Court concluded that this affidavit did not create a genuine issue of fact as it did not dispute that at the time LIRR discharged Bates, his doctor had indicated that he could not function as a pipefitter and he could not be accommodated.

Because the District Court granted summary judgment on this ground, it did not reach the judicial estoppel question. The Court of Appeals remanded as to Bates on the ground that issues remained to be determined.

**JAMES BUTLER:**

James Butler was employed by LIRR as a Car Appearance Maintainer ("CAM") and he worked as a floor preparer in the Paint Shop. As a CAM, he was a member of the Brotherhood of Railway Carmen of the United States and Canada Queens Lodge 886 ("BRCA").

In 1984, Butler commenced an FELA action against LIRR seeking One Million Dollars in damages. He alleged in the FELA action that dust and fumes in the Paint Shop had severely aggravated his asthmatic condition rendering him permanently unable to continue his job. He stopped working on November 4, 1982 and never returned. Even though LIRR had urged him to exercise his bidding privileges under the BRCA/LIRR collective agreement to obtain another position in a different environment, Butler had refused to do so. LIRR had

also referred him for Vocational Evaluation, but, according to the evaluator, Butler's highly negative attitude prevented a conclusive evaluation (RA185-87;189-96).

In October 1986 at the FELA jury trial, Butler's treating physician testified that Butler's asthma was aggravated by dust and fumes in his work environment. The doctor further testified that Butler's condition was permanent and irreversible, and that he could never again perform his job duties even if he wore a mask (RA324-26). The FELA trial jury awarded Butler $164,000 in damages including a specific award of $30,000 for future wage loss. LIRR administratively terminated him two months later on December 2, 1986.

Through BRCA, Butler grieved his termination. His grievance appeal was

denied by the LIRR at the highest company level. However, eleven months after his termination, on November 14, 1987, in response to BRCA's ongoing efforts to settle the grievance, LIRR made a settlement offer to end the dispute. BRCA never responded to the offer.

Butler submitted an affidavit in opposition to LIRR's motion for summary judgment in which he contended merely that he should have been given a different position. Additionally, he submitted an affidavit from a Dr. Zuckerman dated December 12, 1991 (i.e., more than five years after his termination) in which the doctor speculated in direct contradiction of his FELA trial testimony that Butler could have performed the essential functions of a CAM at the time he was discharged. He also submitted an affidavit of the BRCA Chairman

stating that a CAM with Butler's seniority could have bid for a different job which could have been performed in an open yard. The District Court concluded that these affidavits did not create a genuine issue of fact regarding Butler's permanently disabling condition and granted summary judgment in LIRR's favor, declining to reach the judicial estoppel question. The Court of Appeals remanded the case as to Butler, finding that issues of fact remained to be determined.

ANTONIO SALVA:

Antonio Salva was employed by LIRR as a CAM and he was a member of BRCA. On August 5, 1984, he injured his shoulder on the job while lifting bags of ice, and as a result he went out on sick leave and never returned to work. His personal physician concluded that he would not be able to perform any lifting

over his head. LIRR's Medical Director agreed, concluding that Salva could not perform the overhead lifting activities required of a CAM. Consequently, Salva was medically disqualified on May 6, 1985 and LIRR administratively terminated him effective May 7, 1985. Following unsuccessful internal company appeals, Salva's grievance was submitted to arbitration and his termination was upheld.

Following his discharge, Salva instituted an FELA action seeking Five Million Dollars in damages from LIRR for the injuries sustained on August 5, 1984 which were alleged to be permanently disabling. That suit was ultimately settled.

The job description for the CAM position states that the job requirements include lifting (RA1414). Salva confirmed at his deposition in the FELA

case that he was required to lift objects over his head, but that his treating physician had restricted him from performing such activities (RA485-86).

Salva did not dispute the fact that, at the time of his termination, he was not able to perform the essential functions of his job. Nor did he claim that sedentary jobs were available in his craft. Rather, in opposition to LIRR's Motion for Summary Judgment, Salva submitted an affidavit, dated November 8, 1991, from Dr. Jacob Lehman, who, in November, 1984, had stated that Salva could not lift, and in January and February of 1985, that Salva could only do sedentary work (RA1193-94).

By contrast, in the November 1991 Affidavit Dr. Lehman stated that "Salva could sweep, climb into railroad cars [which requires overhead lifting] and

lift a forty pound bucket of water five feet without any restrictions as of the time of his administrative discharge" (emphasis in original) (RA1428). The District Court concluded that the doctor's affidavit was insufficient to raise a genuine issue of material fact and dismissed Salva's claim. The Court of Appeals remanded as to Salva, holding that issues of fact remained to be determined.

**MALACHY LYONS, JR.:**

Malachy Lyons, Jr. was employed by LIRR as a track foreman and was a member of the United Transportation Union ("UTU"). He injured his neck and shoulder on the job in September, 1983 and he subsequently instituted an FELA action against LIRR, alleging that he was permanently disabled from performing his job.

LIRR's consulting physician concluded in September and November, 1984 that Lyons was physically able to return to work (RA1201,1205,1465), but Lyons and his personal physician maintained that Lyons was permanently and totally disabled and unable to do so (RA1207-09). Lyons returned to work on October 15, 1984, but claimed that this aggravated his condition, even though he was only assigned to ride around in a truck, and left early. He never returned.

At his FELA trial in September 1985, Lyons and his treating physician testified that, as recently as the week before the trial, Lyons could not use his arm; he could not do any physical labor; he was still suffering great pain; and he was permanently disabled. Lyons testified that, even though he was a supervisor, physical labor was an

essential part of his job. The treating physician said Lyons could not lift anything heavier than a flashlight and the doctor did not anticipate a recovery (RA1181;1187;1218-58).

On September 24, 1985 at 9:40 a.m., Lyons reported at LIRR's Medical Facility that he was still in pain and had experienced no change in symptoms or functional ability. On that same day, the jury had already decided the issue of liability and heard evidence as to damages. At 2:00 p.m., before the verdict came in on damages, the FELA case was settled for $98,000. The settlement stipulation was made in open court and the presiding trial judge participated in formulating its terms.

On December 11, 1985, LIRR terminated Lyons' employment, based on a review of Lyons' own and his doctor's testimony at the FELA trial that he was

permanently unable to perform the essential functions of his job. The UTU grieved and arbitrated the matter on Lyons' behalf and Lyons' termination was upheld on the grounds of judicial estoppel.

In opposition to LIRR's Motion for Summary Judgment in the District Court Lyons submitted a medical report from LIRR's consulting physician and a portion of that doctor's FELA trial testimony (both of which Lyons and his treating physician had contradicted in 1985) to show that Lyons was not physically unable to perform heavy manual work or his other duties as a track foreman. Lyons also submitted an affidavit from his treating physician, who now said in blatant contradiction of his sworn court testimony in September 1985, that at the time of the termination Lyons was "more than capable

of fully performing the functions in his capacity as track worker - track foreman, even without a 'reasonable accommodation'" (RA1433-34). The doctor inaccurately claimed that he testified at the FELA trial that Lyons was fully able to return to work, but as the District Court noted, neither he nor Lyons pointed to any statement to that effect in the trial transcript.

The District Court dismissed Lyons' Rehabilitation Act claim on the grounds of judicial estoppel. In so doing, the court concluded that Lyons was playing "fast and loose" with the court by making assertions in this action that directly contradict his assertions in the FELA suit and, further, that the FELA court was sufficiently involved in Lyons' recovery to support application of the doctrine. The Court of Appeals reversed, concluding that the doctrine

of judicial estoppel should not have been applied because Lyons' prior FELA suit was settled. In so doing, the Court of Appeals erroneously stated that it was following the "majority view".

## REASONS FOR GRANTING THE WRIT

This petition seeks review of the Court of Appeals' holdings that the District Court had subject matter jurisdiction over this action even though it raises a "minor dispute" under the RLA, that the District Court erred in applying the doctrine of judicial estoppel to Respondent Lyons' Rehabilitation Act claim, and that issues remained to be determined by the District Court on remand with respect to Respondents Bates, Butler and Salva.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT.

A. The Court of Appeals' decision erroneously interprets this Court's recent decision in GILMER v. INTERSTATE/JOHNSON LANE CORP. concerning the arbitrability of statutory claims.

In Gilmer v. Interstate/Johnson Lane Corp., 111 S.Ct. 1647 (1991), this Court held that a statutory civil rights claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., was subject to compulsory arbitration pursuant to the provisions of a securities registration application which provided for arbitration of "'any dispute, claim or controversy'" that arose between petitioner and his employer and was "'required to be arbitrated under the rules, constitutions or by-laws' of" various stock exchanges

with which petitioner was registered. Gilmer, 111 S.Ct. at 1650. In reaching this conclusion, this Court relied upon the fact that the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., "manifest a 'liberal federal policy favoring arbitration agreements.'" 111 S.Ct at 1651. Thus, this Court instructed that the arbitration requirement must be given effect unless the plaintiff meets his burden of showing that "'Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

The Court of Appeals' declaration in the present case that "[w]hen an employee's statutory civil rights have been violated, arbitration should not be

the sole avenue of protection, unless Congress has so specified," 997 F.2d at 1034, is in direct conflict with Gilmer, as this Court, in Gilmer, expressly recognized a presumption in favor of arbitration absent clear congressional intent to the contrary. 111 S.Ct. at 1652.

The Court of Appeals ignored the pronouncements of this Court in Gilmer, concluding instead that "[b]ecause the FAA explicitly excludes contracts of railroad employees from its reach the rationale in Gilmer does not apply in this case." 997 F.2d at 1034. This distinction ignores the fact that the railroad contracts excluded from the FAA are covered instead by the RLA which contains a congressional mandate that disputes between railroads and their employees arising from their employment relationship be resolved through binding

arbitration. See, Elgin, J.& E. Ry. Co. v. Burley, 325 U.S. 711, 723 (1945).

The securities registration application in Gilmer, which was entitled "Uniform Application for Securities Industry Registration or Transfer," 111 S.Ct. at 1650, is akin to the collective bargaining agreements in this case, and the FAA may be compared to the RLA, although the former is less expansive and its requirements are voluntary rather than compulsory. Because the arbitration requirement under the RLA is expressed as a congressional mandate and the collective bargaining agreements involved each contain a grievance provision that is broad enough to cover the types of claims asserted by respondents, the reasons are even more compelling for applying the Gilmer rationale in the instant case than they were for applying it in Gilmer itself. Thus the opinion

of the Court of Appeals was clearly unsound in failing to make the proper analogy.

Indeed, the arbitration requirement in Gilmer was no more specific than the arbitration requirement imposed by the RLA as neither arbitration provision specifically mentions statutory civil rights claims. Thus, there is no logical reason why arbitration of a statutory civil rights claim should be sanctioned by this Court in Gilmer but not by the Court of Appeals in the instant case.

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974),[4] upon which the

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[4] The Court of Appeals also relied on McDonald v. City of West Branch, 466 U.S. 284 (1984) and Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981). As this Court, in Gilmer, distinguished those cases along with Gardner-Denver, the Court of Appeals' reliance on them is also misplaced.

Court of Appeals relied in reaching its decision, has no applicability to the duty to arbitrate under the RLA and to this case, because it did not involve a statute which is as comprehensive as the RLA. Moreover, the three grounds upon which this Court distinguished Gardner-Denver, in Gilmer, apply with equal force here.

First, the instant case, like Gilmer, involves the enforceability of a duty to arbitrate statutory claims; "not the quite different issue [decided in Gardner-Denver] whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." 111 S.Ct. at 1657.

Second, there is no basis in this case for concern about "the tension between collective representation and individual statutory rights," id., because, unlike the plaintiff in

Gardner-Denver, the respondents in this case are guaranteed the right, under the RLA, to file and pursue grievances through arbitration without union involvement. 45 U.S.C. § 153 First(j). See also, Elgin, 325 U.S. at 728-38.

Third, Gardner-Denver was decided under the Labor Management Relations Act, 29 U.S.C. § 185; not the FAA or the RLA. As previously discussed, the arbitration requirements under the RLA constitute a congressional mandate and are thus stronger than the mere "policy" which, as this Court noted in Gilmer, 111 S.Ct. at 1657, the FAA reflects.

The failure of the Court of Appeals to correctly apply Gilmer creates a gross anomaly that begs for this Court's resolution. As a result of the decision of the Court of Appeals, stockbrokers subject to the arbitration requirement construed in Gilmer must arbitrate their

statutory civil rights claims pursuant to the FAA - a statute that merely approves the use of arbitration agreements - while railroad employees who are subject to the RLA - a statute that compels arbitration - are not required to do so. There is nothing in the RLA or the Rehabilitation Act which justifies such disparate treatment.

B. The Court of Appeals' decision is in conflict with the applicable line of cases in which this Court has construed the arbitration requirements of the RLA.

The Court of Appeals aptly recognized that Respondents' disability discrimination claims "implicate those portions of their collective bargaining agreements that provide for physical disqualification from employment." 997 F.2d at 1034. Nevertheless, that Court failed to reconcile the significance of

this fact with the mandatory arbitration requirement of the RLA. Indeed, the Court erroneously referred to that arbitration requirement as "voluntary," 997 F.2d at 1035, rather than compulsory.

The RLA was enacted to establish a mechanism "for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." 45 U.S.C. § 151a(5). Section 3 of the RLA requires that such disputes be settled through an internal grievance process, but failing settlement in that informal manner that they be referred for arbitration to the National Railroad Adjustment Board

("NRAB")[5]. The awards of the NRAB are final and binding and subject only to an extremely limited scope of judicial review in the federal district court. U.S.C. § 153 First (i),(m). See also, 45 U.S.C. § 153 Second.

Construing these sections, this Court has labeled the disputes described as "minor disputes" and has repeatedly reiterated that the arbitration requirements are mandatory and that the jurisdiction of the NRAB to resolve these "minor disputes" is exclusive. See,

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5 The RLA authorizes the use of special boards of adjustments established by agreement between the railroad and the union to arbitrate disputes in place of the NRAB. These special boards are commonly known in the industry as "Public Law Boards." See 45 U.S.C. §153 Second. Courts have construed Public Law Boards to be equivalent to the NRAB. Both will be collectively referred to in this Petition as the NRAB.

e.g., Consolidated Rail Corp. v. Ry. Labor Executives' Ass'n., 491 U.S. 299, 303-04 (1989) (dictum); Union Pacific R.R. Co. v. Sheehan, 439 U.S. 89, 94 (1978); Andrews v. L.& N.R.R., 406 U.S. 320, 322 (1972); Gunther v. San Diego & A.E. Ry., 382 U.S. 257, 263 (1965); Pennsylvania R.R. v. Day, 360 U.S. 548, 554 (1959).

Consistent with this Court's interpretation of the broad scope of the NRAB's exclusive jurisdiction and of the RLA's mandate requiring arbitration, lower courts have required arbitration of claims brought by railroad employees, even where those claims have been asserted under other federal laws. Porter v. Atchison Topeka & Santa Fe Ry., 768 F. Supp. 571 (N.D. Tex. 1991) (Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.), Newton v. Southern Pac. Transp. Co., 61

U.S.L.W. 2282 (W.D. Tex. 1992) (race discrimination under 42 USC §2000e et seq. ("Title VII")); Hirras v. National Railroad Passenger Corp., 826 F. Supp. 1062 (W.D. Texas 1992), appeal pending, No. 92-5753 (5th Cir. 1993) (sex discrimination and sexual harassment under Title VII)[6]; Felt v. Atchison Topeka & Santa Fe Ry. Co., 62 U.S.L.W. 2142 (C.D. Cal. 1993) (religious discrimination under Title VII). The decision of the Court of Appeals is in conflict with these authorities.

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6 Oral argument of the pending appeal in Hirras, is scheduled in the Court of Appeals for the Fifth Circuit for early October 1993 after the deadline for filing this Petition for Certiorari. In the event that Hirras is affirmed, it will create a direct conflict with the case at bar which will provide an additional basis for granting certiorari in this case. However, by then Petitioner herein would be foreclosed from seeking certiorari

Atchison, Topeka & Santa Fe Co. v. Buell, 480 U.S. 557 (1987), in which this Court held that the RLA did not deprive a district court of jurisdiction to hear a claim for personal injuries under the FELA, is not dispositive of the question raised in this case. It is clearly distinguishable for several reasons. First, this Court limited Buell to its facts, Hirras, 826 F. Supp. at 1065. Second, Buell involved the FELA which applies specifically and solely to railroads. Thus a finding that the RLA preempts FELA lawsuits would have

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on that ground because of the time element involved. While the Court of Appeals for the Fifth Circuit will probably decide Hirras before this case is heard (if certiorari is granted), Hirras and the other similar cases cited demonstrate that the issue presented is not unique. Thus, an opinion from the Supreme Court would provide much needed guidance in the future. Therefore, review by this Court is appropriate at this time.

rendered the FELA meaningless - an outcome which Congress surely could not have intended when it enacted the RLA twenty years after the FELA without mentioning the latter statute. Third, the decision, in Buell was based partly on the Gardner-Denver line of cases, the applicability of which, as previously discussed, this Court substantially limited in Gilmer. Fourth, in Buell, the issue raised in the FELA action as to whether or not the railroad was negligent in failing to provide a safe place to work was determinable without an interpretation of the parties' collective bargaining agreement. By contrast in the case at bar, the central questions raised, as to whether Petitioner could properly discharge employees on the basis of their physical condition and whether

respondents were entitled to other jobs or rights under their collective bargaining agreements, cannot realistically be determined without examining and interpreting the parties' rights under the collective bargaining agreements. The Second Circuit's ruling to the contrary would require the District Court to assume the function that Congress, through the RLA, assigned exclusively to the NRAB. Indeed, the question of whether an individual with a particular disability is able to perform the essential functions of a given railroad job calls on the special expertise of the NRAB. This is exactly why Congress established the NRAB and organized it into divisions by craft. See, 45 U.S.C. §153 First (h).

Because respondents' Rehabilitation Act claims turn on the provisions of their respective collective bargaining

agreements, those claims constitute "minor disputes" under the RLA and they must be resolved through arbitration. To permit otherwise would inpermissibly interfere with the RLA's statutory mandate which Congress has so carefully crafted.

## II. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER APPEALS COURTS ON THE SAME ISSUE.

The Court of Appeals' decision raises an important, emerging question of federal law which has not been, but should be, decided by this Court. Other state and federal appeals courts have addressed the question of whether state statutory civil rights claims are pre-empted by the RLA and have held that they are. Croston v. Burlington R.R., 999 F.2d 381 (9th Cir. 1993) (disability discrimination under Montana law);

O'Brien v. Consolidated Rail Corp., 972 F.2d 1 (1st Cir. 1992), cert. denied 113 S.Ct. 980 (1993) (Massachusetts handicap discrimination law); McCall v. Chesapeake & Ohio Ry., 844 F.2d 294 (6th Cir. 1988), cert. denied 488 U.S. 879 (1988) (Michigan handicap discrimination law); Maher v. New Jersey Transit Rail Operations, Inc., 125 N.J. 455, 593 A.2d 750 (1991) (New Jersey anti-discrimination law); Evans v. So. Pacific Transp. Co., 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416, (Cal. App. 2 Dist. 1989), review denied (1989), cert. denied, 496 U.S. 936 (1990) (California fair employment law).

The decision of the Court of Appeals is contrary to the weight of these authorities. Although those cases considered the question of the RLA's preemption of state rather than federal claims, there is no logical reason why

the rationale employed there should not apply equally to the case at bar.

The essential principles to be gleaned from those cases are that (1) the RLA preempts a claim that involves a "minor dispute" because such a dispute must be arbitrated in accordance with the RLA's mandate, and (2) a claim for disability discrimination is uniquely different from any other statutory civil rights claim because it necessarily requires application and interpretation of the collective bargaining agreement with regard to issues of physical disqualification. These principles are pertinent whether or not the handicap claim is founded on federal or state law.

The Court of Appeals' refusal to follow O'Brien based on the superficial distinction that it involved a state law claim creates a conflict which renders

this case appropriate for review at this time.

## III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE APPLICATION OF JUDICIAL ESTOPPEL IN A LATER PROCEEDING WHEN A LITIGANT INDUCED A SETTLEMENT IN A PRIOR PROCEEDING BASED ON A CONTRARY POSITION, THUS COMPROMISING THE SANCTITY OF THE JUDICIAL PROCESS

The court of appeals incorrectly reversed the District Court on the issue of whether or not respondent Lyons should be judicially estopped from asserting a factual position in this proceeding which is completely contrary to the position he took in an earlier proceeding. The Second Circuit's decision should be reversed as, among other reasons, it is based on the application of what it stated to be the "majority view", when in fact only a small minority of the circuits follow that view when applying the doctrine of

judicial estoppel.

Almost one hundred years ago, this Court laid down as a general proposition that:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895).

Today, judicial estoppel, as a general principle, is presently recognized by all of the federal circuits except the Tenth Circuit.[7]

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7 In United States v. 49.01 Acres of Land, the Tenth Circuit rejected the doctrine on the basis of a 1956 decision which rejected judicial estoppel because of "the great weight of authority" which did not support the principle at that time. 802 F.2d 387, 390 (10th Cir. 1986) (citing Parkinson v. California Co., 233 F.2d 432 (10th Cir. 1956)).

See, Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211-15 (1st Cir. 1987); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990); Scarano v. Central R.R., 203 F.2d 510, 512-14 (3rd Cir. 1953); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166-68, (4th Cir. 1982); United States for Use of American Bank v. C. I. T. Constr. Inc., 944 F.2d 253, 257-59 (5th Cir. 1991); Teledyne Industries, Inc. v. N.L.R.B., 911 F.2d 1214, 1217-20 (6th Cir. 1990); Kale v. Obuchowski, 985 F.2d 360, 361-63 (7th Cir. 1993); Monterey Development Corp. v. Lawyer's Title Ins. Corp., 1993 WL 328474 (8th Cir. 1993) (case no. 93-1191 filed Sept. 1, 1993) (applying Missouri law); Yanez v. U.S., 989 F.2d 323, 325-27 (9th Cir. 1993); American Nat'l. Bank of Jacksonville v. F.D.I.C., 710 F.2d 1528, 1535-36 (11th Cir. 1983);

Wang Lab., Inc. v. Applied Computer Sciences, Inc., 958 F.2d 355, 358-59 (Fed. Cir. 1992) (applying First Circuit law); Konstantinidis v. Chen, 626 F.2d 933, 936-39 (D. C. Cir. 1980)(applying District of Columbia law).

Judicial estoppel bars a party from assuming "inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." Scarano, 203 F.2d at 513 (quoting II Freeman on Judgments § 631 (5th ed. 1925)). The underpinnings of the doctrine were explained in Scarano:

> A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing "fast and loose with the

> courts" which has been emphasized as an evil the courts should not tolerate.

Id.

Thus, acceptance of the doctrine is on solid footing among the federal circuit courts. Application of the doctrine, however, has generated considerable confusion. Young v. U.S. Dep't. of Justice, 882 F.2d 633, 639 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990); 1B J. Moore, J. Lucas and T. Currier, Moore's Federal Practice ¶0.405[8] at 245-46 (2d ed. 1992) (circumstances calling judicial estoppel into play are "far from clear").

Perhaps due to the lack of direction from this Court, the lower federal courts are haphazardly applying the doctrine and reaching inconsistent results. The Second Circuit's opinion in this matter is one such example of a court errantly applying the doctrine.

Prior to this case, the Second Circuit had not defined the elements underlying judicial estoppel (A42). In its opinion below, the Court attempted to so define the elements. However, in so doing, it relied on an older decision from another circuit which had the effect of perpetuating an erroneous statement of the "majority" and "minority" views of the essential elements:

> First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner.

(A44) (emphasis added).

With respect to the second prong, the court explained in a footnote that the Second Circuit follows the "majority view," which requires judicial acceptance of the inconsistency (citing Merrill Lynch, 903 F.2d at 114) (A45).

It then referred to the rejected "minority view," which does not impose judicial acceptance of the inconsistency. Id. (citing Stevens Technical Services, Inc. v. SS Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989)). A recent survey of the circuits, however, shows that the "majority" and "minority" views are in fact just the opposite.

As noted above, the second prong requires that there be "judicial adoption" or "judicial acceptance" of the inconsistent position. Contrary to what the Second Circuit stated below, most of the circuits that have decided the issue do not require that a court must have adopted the inconsistent position.[8] In fact, only three

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8 The Ninth Circuit expressly declined to state whether or not the court's adoption of the inconsistent position was necessary. Yanez, 989 F.2d at 326-27.

circuits have expressly required that there be such an adoption. See, C.I.T. Constr., 944 F.2d at 259 (Fifth Circuit); Teledyne, 911 F.2d at 1218 (Sixth Circuit); Konstantinidis, 626 F.2d at 936-37 (D.C. Circuit, applying District of Columbia law).

Five federal circuit courts of appeal, a majority in this context, have held either that the court need not have actually adopted the inconsistent position in order to successfully invoke judicial estoppel, or that the estopped party need not have been actually successful in litigating its earlier inconsistent position. These courts have stated that the facts underlying the inconsistency should be looked at in order to determine if the offending party had "played fast and loose with the court," thereby undermining the

integrity of the judicial system. See U.S. v. Levasseur, 846 F.2d 786, 793 (1st Cir. 1988) cert. denied, 488 U.S. 894 (1988) ("attempting" to invoke court approval is only requirement); Scarano, 203 F.2d at 513 (Third Circuit) ("aid of judicial proceeding" required); Zurich, 667 F.2d at 1167 (Fourth Circuit) (judicial estoppel not confined to situations where inconsistent party prevailed); Kale, 985 F.2d at 362 (Seventh Circuit) (inducing opponent to surrender to a settlement, and court approval of settlement, judicially estopped inconsistent party); Wang, 958 F.2d at 358 (Federal Circuit) (applied First Circuit's "attempt to invoke court approval" standard). Thus, a settlement prior to a final court decision does not automatically bar the application of judicial estoppel in the majority of circuits.

As stated above, this case involves just such a situation. In the earlier trial, Respondent Lyons introduced evidence that he was permanently disabled and, as a result, he could not return to work. Now, however, Lyons maintains that he is not disabled and LIRR must reinstate him. In other words, he is playing "fast and loose" with the judicial process, thereby gaining an unfair advantage. Lyons' inconsistent statement induced LIRR to reach a compromise with him prior to a final judgment on the damage issue. As the Seventh Circuit recently stated, "[f]requently, . . . a settlement represents capitulation. Persons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment." Kale, 985 F.2d at 362.

Moreover, Lyons' inconsistent position did not result in a settlement with the court's mere "rubber stamp" approval. Rather, the court was actively involved in independently ascertaining whether or not to approve the settlement. The Second Circuit's ruling ignores the reality of judicial involvement in bringing about settlements. Correctly so, the District Court found that the Court was "sufficiently involved in Lyons' recovery" and that Lyons should now be judicially estopped from prevailing on facts contrary to the underpinnings of the settlement.

Hence, the importance of which standard should be applied is self-evident. Under the true majority view, Lyons should be judicially estopped from asserting that he should be reinstated and his claim for reinstatement should be dismissed. Under the true minority

view, however, Lyons is allowed to completely contradict his earlier testimony, which enabled him to receive Ninety-Eight Thousand Dollars in full settlement, and maintain his lawsuit for reinstatement.

Employing the latter standard, as the Second Circuit did below, condones behavior which is abhorrent to the sanctity of the judicial process. LIRR is penalized for opting to settle sooner rather than wait for a damage verdict later. Litigants such as Lyons, who so casually speak such contrary facts to the courts, should not be rewarded for their disingenuity.

This issue has "percolated" in the circuits for some time. This is an easy case to set a uniform policy that litigants are hereafter barred from stating clear inconsistent facts when

seeking relief in the courts of the United States.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review and reverse the decision of the United States Court of Appeals for the Second Circuit with respect to Respondents Bates, Butler, Salva and Lyons.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 1283-- August Term 1992

(Argued: April 30, 1993 Decided: July 2, 1993)

Docket No. 92-9308

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JOHN BATES, JAMES BUTLER, VINCENT GONZALEZ, FLOSSIE HORSEY, HENRY ROBINSON, ANTONIO SALVA, ALAN WAYNE, JOSEPH ABRAMS, AND MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

--v.--

LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

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Before:

NEWMAN, MAHONEY, Circuit Judges
and EGINTON*, District Judge.

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* Warren W. Eginton, Senior Judge, United States District Court for the District of Connecticut, sitting by designation.

Appeal from two rulings of the United States District Court for the Eastern District Court (Nickerson J.), which granted defendant-appellee Long Island Rail Road Company's motion for summary judgment pursuant to Fed. R. Civ. P. 56.

Affirmed in part and Reversed and Remanded in part.

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MARK GLEN SOKOLOFF, New York, New York (Jamie Mercado, of Counsel), for Plaintiff-Appellants John Bates, James Butler, Vincent Gonzalez, Flossie Horsey, Henry Robinson, Antonio Salva, Alan Wayne, and Joseph Abrams.

ALEXANDER J. WULWICK, New York, New York, for Plaintiff-Appellant Malachy Lyons, Jr.

SHARON PATTERSON DOMINGO, Jamaica, New York, for Defendant-Appellee Long Island Rail Road.

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EGINTON, Senior U.S. District Judge:

Appellants John Bates, James Butler, Vincent Gonzalez, Flossie Horsey, Henry Robinson, Antonio Salva, Alan Wayne, Joseph Abrams, and Malachy Lyons, Jr. bring this action under § 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794. They claim that Long Island Rail Road Company ("LIRR") wrongfully terminated them on the basis of their respective disabilities. They further allege that LIRR failed to reasonably accommodate them when it refused to offer them different jobs within their crafts to which they were allegedly entitled under the terms of their respective collective bargaining agreements. All of the appellants were members of unions that were parties to collective bargaining agreements with LIRR, negotiated pursuant to the Railway

Labor Act ("RLA"). 45 U.S.C. § 151 et seq. Under each of the relevant collective bargaining agreements, LIRR has the right to summarily terminate employees for non-disciplinary reasons in certain circumstances. For example, an employee who fails to pass a required medical examination may be deemed physically disqualified to perform his job and administratively terminated or transferred to a different position. The collective bargaining agreements clearly provide, however, that an employee may not be transferred when such transfer would bump a more senior employee from his position. Although LIRR's policy is to return injured employees to work as soon as possible after work-related injuries, none of the appellants except Joseph Abrams was reinstated. Because the facts relating to each appellant vary, we address the

circumstances of each individual below.

John Bates

John Bates, a member of the Sheet Metal Workers International Association ("SMW"), was employed by LIRR as a pipefitter. In December 1981, he injured his left ankle and wrist on the job and quit working on the ground that he was permanently unable to perform his job as a pipefitter. Bates' treating physician and LIRR's Medical Director confirmed that Bates was indeed permanently disabled from performing the duties of a pipefitter.

Subsequently, Bates sued LIRR under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 et seq., seeking $1,000,000 in damages for his work-related injuries. At the FELA trial, Bates' treating physician testified that Bates' ankle injury would permanently prevent Bates from required

walking, climbing, carrying pipes, or standing in one position for any length of time--all essential functions of sheet metal workers. Thus, the doctor concluded that Bates was permanently disabled from his job as a pipefitter and from any other job within his craft. Bates also testified that he could not find an alternative job for which he was physically qualified. Finally, the record reveals that LIRR had attempted to place Bates in a more sedentary job on two occasions but that Bates was physically unable to perform either job because both jobs involved carrying weights.

In 1985, the FELA trial jury awarded Bates $450,000 damages, reduced 50% for his own negligence. Subsequently, LIRR's Medical Director examined Bates and concluded that Bates was permanently disabled from sheet

metal work, after which LIRR administratively discharged him. Through the SMW, Bates grieved and arbitrated his termination, but a Public Law Board upheld his discharge on estoppel grounds.

After losing his grievance, Bates filed this action claiming that LIRR discriminated against him by failing to accommodate his disability as required by the Rehabilitation Act. As proof for his discrimination claim, Bates submitted an affidavit which states that a doctor examined him in late 1985 and found him able to perform the essential functions of his job as a pipefitter. Nevertheless, the district court found that this affidavit did not create a genuine issue of fact as to Bates' permanently disabled condition at the time of his discharge and granted summary judgment in favor of LIRR.

James Butler

James Butler was employed by LIRR as a Car Appearance Maintainer ("CAM") and worked as a floor preparer in the Paint Shop. As a CAM, he was a member of the Brotherhood of Railway Carmen of the United States and Canada Queens Lodge 886 ("BRCA").

In 1982, Butler left work on the ground that the dust and fumes in the Paint Shop had aggravated his asthma so severely that he was permanently disabled from continuing his job as a CAM. He rejected LIRR's suggestion that he bid for an alternate position and sued LIRR under FELA seeking $1,000,000 in damages for the aggravation of his asthmatic condition.

At the FELA trial, Butler's treating physician testified that Butler's bronchial asthma had been aggravated by his work environment

and was so severe that he was permanently disabled from performing his job in the Paint Shop, even if he wore a mask. The jury awarded Butler $164,000 in damages, including a specific award of $30,000 for future lost wages.

Two months after the verdict, LIRR administratively terminated Butler because he was physically disqualified from performing his job. Through the BRCA, Butler grieved his termination, but his grievance appeal was denied by LIRR. Nevertheless the BRCA continued to press Butler's grievance until LIRR made a settlement offer to Butler to end the dispute. The BRCA failed to respond to LIRR's settlement offer.

Butler then filed the instant action on the ground that LIRR had violated the Rehabilitation Act by failing to accommodate him by placing him in an alternate position within

his craft. In support of his claim, Butler filed an affidavit of his treating physician which stated that Butler could have performed the essential functions of a CAM at the time he was discharged. He also filed an affidavit of the BRCA Chairman stating that Butler could have bid for a position in an open yard at the time of his discharge. After reviewing all the evidence, the district court found that these affidavits did not create a genuine issue of fact regarding Butler's permanently disabled condition and granted summary judgment in favor of LIRR.

Vincent Gonzalez

Vincent Gonzalez, a member of the International Brotherhood of Electrical Workers AFL-CIO Local 589 ("IBEW"), was employed by LIRR as an electrician for 26 years. He retired in 1982 and is

collecting two pensions which together almost equal the salary he was earning in his last year of employment.

In 1979, Gonzalez was injured on the job and, subsequently, filed three separate FELA actions against LIRR on the ground that he was permanently disabled from working as an electrician. Two of these actions were discontinued, however, and the third was closed for failure to prosecute. Gonzalez stopped working in October 1979, and retired in November 1982.

Five years after his retirement, Gonzalez filed the instant action claiming that LIRR had discriminated against him because of his disability. The lower court dismissed his claim because Gonzalez failed to file within the applicable three-year statute of limitations.

Flossie Horsey

Flossie Horsey was employed by LIRR as a CAM and is a member of the BRCA. In 1985, she injured her back on the job and left work on sick leave. During her sick leave, Horsey failed to report to LIRR's Medical Department for required medical exams, failed to offer any explanation for her failure to appear for the exams, and failed to respond to LIRR's written notices inquiring about her absences.

Consequently, LIRR notified Horsey that she would be disciplined for insubordination if she failed to contact LIRR with an explanation. Horsey did not contact LIRR. As a result, disciplinary proceedings were instituted against her. Despite written notice of the disciplinary hearing, Horsey failed to appear at her hearing or offer an explanation for her absence. When the

hearing was rescheduled, Horsey again failed to appear. Thus, she was found guilty of insubordination and dismissed from service.

Through the BRCA, Horsey filed a grievance against LIRR. The grievance was denied by LIRR, but did not progress to a Public Law Board. Subsequently, Horsey filed the instant action claiming that LIRR had discriminated against her because of her disability. The district court dismissed her claim on the ground that she had not been terminated solely because of her handicap.

Henry Robinson

Henry Robinson was employed by LIRR as a CAM and is a member of the BRCA. In 1978, he injured his back on the job and stopped working on the ground that he was permanently disabled. He then filed a FELA action against LIRR seeking $500,000 in damages. During the FELA

trial, Robinson's treating physician testified that Robinson was permanently disabled from performing any job that required lifting or bending--essential functions of his prior job. The jury awarded Robinson $71,000, reduced by 25% for his own negligence.

On the same day as the verdict, Robinson asked to be reinstated. After LIRR advised him to consult the BRCA, Robinson wrote to LIRR's President asking to be placed in a different and more sedentary position. Robinson then visited LIRR's Medical Department seeking authorization to obtain a light duty job, at which time, according to LIRR, he told LIRR's Medical Director that he had lied about his permanent disability in his FELA action.

LIRR decided not to reinstate Robinson, and the BRCA filed a grievance on his behalf. During a three year

grievance proceeding according to LIRR, Robinson did not communicate with LIRR, retained several other jobs with different employers, and was arrested for possession of a stolen weapon but convicted of a reduced charge. After three years, the union wrote to LIRR to inquire whether Robinson would be reinstated. LIRR responded that it would not reinstate Robinson.

Subsequently, Robinson filed the instant action claiming LIRR had discriminated against him because of his disability. The court below dismissed his claim on the ground that Robinson had failed to file his claim within the applicable three-year statute of limitations and that the grievance proceeding did not toll the statute of limitations.

Antonio Salva

Antonio Salva, a member of the

BRCA, was employed by LIRR as a CAM. In 1984, he injured his shoulder on the job, went out on sick leave, and has never returned to work. In May 1985, LIRR's Medical Director and another doctor determined that Salva was permanently disabled from overhead lifting activities and therefore unable to perform his former job. LIRR also determined that Salva was not physically able to serve in any job classification for which he held seniority. Thus, LIRR administratively discharged him.

Through the BRCA, Salva filed a grievance against LIRR. A Public Law Board ultimately affirmed Salva's termination. During the course of the grievance proceeding, Salva filed a FELA action against LIRR seeking $5,000,000 in damages for his permanently disabling shoulder injury. This action ultimately was settled.

Subsequently, Salva filed the instant action claiming that LIRR had discriminated against him because of his disability. In support of his claim, Salva submitted an affidavit of his physician. In direct contradiction to prior statements he had made regarding Salva, Salva's physician stated that Salva could sweep, clean, and lift without any restriction at the time he was discharged. The district court found that this affidavit did not create a genuine issue of material fact as to Salva's physically disqualified condition and dismissed his claim.

Alan Wayne

Alan Wayne was employed by LIRR as a CAM and is a member of the BRCA. In 1982, he fell 5-6 feet to the ground while cleaning a railroad car and severely injured his back. After Wayne's treating physician, LIRR's

Medical Director, and a consulting physician all testified that Wayne suffered chronic pre-existing anxiety and was permanently disabled from performing his former job, LIRR administratively discharged Wayne. Wayne instituted grievance proceedings and, in July 1984, a public law board upheld his termination.

In 1982, Wayne filed a FELA suit against LIRR seeking $750,000 in damages on the ground that he was permanently disabled from performing his former job. Less than a year later, Wayne withdrew this FELA action and instituted a new FELA action seeking $2,000,000 in damages for the same injuries.

In 1987, Wayne filed the instant action claiming that LIRR had discriminated against him because of his disability. The district court dismissed his claim because he failed

to file within the applicable three-year statute of limitations.

Joseph Abrams

Joseph Abrams was employed by LIRR as an electrician and is a member of the IBEW. In 1980, he injured his back on the job, after which he never returned to work, except for three brief periods between November 1980 and September 1982. In 1985, LIRR referred Abrams for Vocational Rehabilitation Counseling and he underwent vocational testing at LIRR's cost, but reported that he could not sit for more than 10-30 minutes at a time. He subsequently declined LIRR's offer of outside placement and applied for a disability pension from the Railroad Retirement Board in 1986.

In 1983, Abrams filed a FELA action against LIRR seeking $3,000,000 in damages for injuries which he claimed permanently disabled him from performing

his former job. In a bifurcated trial, the jury returned a verdict on the issue of liability, apportioning 35% to LIRR and 65% to Abrams for his own negligence.

Prior to the trial on damages, LIRR's Medical Department concluded that Abrams was physically unable to perform any job within his craft for which he held seniority. Thus, LIRR administratively discharged Abrams. Through the IBEW, Abrams filed a grievance against LIRR. After a medical examination ordered by a Public Law Board was conducted, the treating physician concluded that Abrams could return to work but in a less physically demanding capacity. In 1989, the Public Law Board ordered that Abrams, in exchange for a different position, forfeit any rights he had under FELA, and thereafter, LIRR reinstated Abrams with full seniority and back pay.

Abrams then filed this action claiming that LIRR had discriminated against him because of his disability. The court below found that Abrams had received more favorable treatment than required under the Rehabilitation Act and dismissed his claim.

Malachy Lyons, Jr.

Malachy Lyons, Jr. was employed by LIRR as a track foreman and is a member of the United Transportation Union ("UTU"). In 1983, he was injured on the job. LIRR's consulting physician and Lyons' personal physician disagreed about whether Lyons' condition was permanently disabling. Nevertheless, Lyons returned to work in a more sedentary job, which ultimately aggravated his previous injury and forced him to stop working.

Subsequently, Lyons instituted a FELA action against LIRR. At the FELA

trial, Lyons' treating physician testified that Lyons was permanently disabled from physical labor--an essential function of his job as a foreman. The jury made a finding of liability against LIRR, but before there was a verdict on damages, LIRR settled for $98,000.

In 1985, LIRR administratively discharged Lyons on the ground that he was physically disqualified from performing his former job. A Public Law Board affirmed his termination. After the ruling by the Public Law Board, Lyons filed this action claiming that LIRR had discriminated against him because of his disability. In support of his claim, he submitted an affidavit of his treating physician which contradicted the treating physician's FELA trial testimony. The lower court dismissed Lyons' claim under the

doctrine of judicial estoppel, holding that Lyons could not take a position in this action that was inconsistent with his position in his previous FELA action.

DISCUSSION

Subject Matter Jurisdiction

The threshold issue on appeal is whether the district court lacked subject matter jurisdiction over this action. LIRR contends that because appellants' claims require interpretation of the applicable collective bargaining agreement, they are "minor disputes" under the RLA. Minor disputes must be resolved pursuant to the exclusive dispute resolution procedures outlined in § 3 of the RLA. 45 U.S.C. § 153; Andrews v. Louisville & Nashville RR, 406 U.S. 320, 322 (1972); Airline Pilots Ass'n. Int'l v. Trans World Airlines, Inc., 713 F.2d 940, 948 (2d Cir. 1983), aff'd in part, rev'd in

part on other grounds, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

While it is true that appellants' discriminatory discharge claims may implicate those portions of their collective bargaining agreements that provide for physical disqualification from employment, it is not true that their exclusive remedy for their allegedly wrongful discharges is arbitration. LIRR's reliance on Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1650 (1991), is misplaced. In Gilmer, the Supreme Court held that a claim brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., was subject to compulsory arbitration pursuant to an arbitration agreement.

Gilmer relied on the Federal Arbitration Act's policy favoring

arbitration in determining that Gilmer's statutory civil rights claim waa subject to arbitration. See Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. Because the FAA explicitly excludes contracts of railroad employees from its reach, the rationale in Gilmer does not apply in this case. See 9 U.S.C. § 1. Further, Gilmer did not involve a collective bargaining agreement.

Although courts "ordinarily defer to collectively bargained dispute-resolution procedures when the parties' dispute arises out of the collective-bargaining process," there are certain instances when arbitration may be inadequate to protect an employee's rights. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981). When an employee's statutory civil rights have been violated, arbitration should not be

the sole avenue of protection, unless Congress has so specified.

The Supreme Court in Alexander v. Gardner-Denver, 415 U.S. 36, 53-54, 59-60 (1974), held that an employee who previously had arbitrated his claim of wrongful discharge under the terms set forth in his collective bargaining agreement was not precluded from bringing a claim of discriminatory discharge under Title VII of the civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., in federal court. The Court explained that "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." 415 U.S. at 50.

Similarly, the Court in McDonald v. City of West Branch, 466 U.S 284 (1984), held that a civil rights action brought under 42 U.S.C. § 1983 was not precluded in federal court because of its prior submission to arbitration pursuant to a collective bargaining agreement. Following the reasoning in Gardner-Denver, the Court stated that "although arbitration is well suited to resolving contractual disputes, . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." 466 U.S. at 290. Applying Gardner-Denver and McDonald, we hold that the arbitration procedures prescribed under the RLA are not appellants' sole forum for resolution of their Rehabilitation Act claims.

LIRR argues that the reasoning in

O'Brien v. Consolidated Rail Corp., 972 F.2d 1, 5 (1st Cir. 1992), cert. denied, 113 S. Ct. 980 (1993), should apply since handicap discrimination claims are different from other types of discrimination claims. In O'Brien, the First Circuit held that the RLA preempted a state law handicap discrimination claim. O'Brien is clearly distinguishable from the instant case, since it focused on avoiding state law interference with a federal statutory scheme. 972 F.2d at 4. In this case, we deal with two federal statutory schemes: one for encouraging voluntary arbitration of labor disputes and the other for eliminating discrimination in the workplace. These competing federal policies are not mutually exclusive; rather, they must be balanced.

In Gardner-Denver, the Court stated

that arbitration was an inappropriate forum for the final resolution of civil rights claims for several reasons. First, arbitrators resolve disputes according to the terms of the collective bargaining agreement--not according to federal law. Their expertise is the "law of the shop, not the law of the land." 415 U.S. at 57. Second, the fact-finding process in arbitration generally is not equivalent to judicial fact-finding. Because arbitration is designed to resolve labor disputes inexpensively and efficiently, the parties to arbitration generally do not conduct extensive discovery and do not use the Federal Rules of Evidence. Absent the same rights and procedures provided in federal court, arbitration should not be the sole forum for final resolution of federal civil rights claims. 415 U.S. at 57-58. Thus,

appellants' claims of discrimination under the Rehabilitation Act are not barred by their prior arbitration pursuant to the RLA.

Prima Facie Case of Discrimination

Having determined that the district court had jurisdiction to consider appellants' claims under the Rehabilitation Act, we now must determine whether the district court erred in holding that Bates, Butler, Salva, Abrams, and Horsey failed to establish a prima facie case of discrimination. In order to establish a prima facie case, appellants must show that at the time of their discharge (1) they were handicapped within the meaning of the Rehabilitation Act; (2) they were otherwise qualified to perform the essential functions of their given positions; (3) they were discharged solely on the basis of their

handicaps; and (4) LIRR receives federal financial assistance. Doe v. New York Univ., 666 F.2d 761, 774-76 (2d Cir. 1981).

It is undisputed that LIRR receives federal financial assistance and that appellants were handicapped within the meaning of the Rehabilitation Act. Further LIRR concedes that it discharged Bates, Butler, Salva, and Abrams solely because of their handicaps. Thus, the only issues determined by the district court were whether appellants were otherwise qualified to perform the essential functions of their given positions and whether appellant Horsey was discharged solely on the basis of her handicap.

a. Bates, Butler, Salva, and Abrams

In Gilbert v. Frank, 949 F.2d 637, 642 (2d Cir. 1991), this court held that

the plaintiff has the initial burden of showing that "she or he can perform the essential functions of the job in spite of the handicap either (a) with no need for accommodation, or (b) with a reasonable accommodation." To show this, appellants must present evidence regarding their individual physical capabilities and suggest "some reasonable assistance or job modification by the employer." Id. Plaintiffs argue that LIRR failed to reasonably accommodate them by refusing to allow them to bid for less strenuous positions within their crafts, as provided for in their respective collective bargaining agreements.

The district court found that LIRR was required to reasonably accommodate plaintiffs only with respect to the specific positions they previously held. While reasonable accommodation

generally does not require an employer to reassign a disabled employee to a different position, an employer may not deny an employee his or her contractual right to bid for reassignment by reason of a disability. As the Supreme Court noted in School Board v. Arline, 480 U.S. 273, 289 n.19 (1987),

> Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies.

See also Lyles v. Department of the Army, 864 F.2d 1581, 1583 (Fed. Cir. 1989) (employee who does not meet requirements of position may be dismissed "unless additional rights are available from some other source"); Shea v. Tisch, 870 F.2d 786, 790 (1st Cir. 1989) ("an employer is not required to

find alternative employment unless he normally does so under his existing policies").

The relevant collective bargaining agreements in this case provide that when new positions are created or vacancies occur, employees eligible for the positions may bid for them. Generally, LIRR awards the position to the most senior qualified employee who bid. However, the collective bargaining agreements also contain faithful service provisions which provide that

> Employees who have given long and faithful service in the employ of [LIRR] and who have become unable to handle heavy work to advantage, will be given preference of such light work, if available, in their line, as they are able to handle satisfactorily, and will be paid the rate of position to which assigned.

JA 655, Rule 42; JA 575, Rule 22. While the bidding and faithful service provisions do not guarantee that a

particular employee's bid will be accepted or, once accepted, eliminate the possibility of being bumped by a more senior employee in the future, these uncertainties are not relevant to the determination of whether an employee was denied a contractual right by reason of a disability.

Issues remain as to whether LIRR refused to allow plaintiffs Bates, Butler, and Salva to bid for positions as provided for in their respective collective bargaining agreements. These issues must be determined by the district court on remand, though it may be that as to one or more employees, the issue might be resolved by summary judgment.

The district court, however, properly granted summary judgment with respect to plaintiff Abrams. Because Abrams was reinstated to a less

strenuous position than he previously held, with full seniority and back pay, there is no genuine issue of fact as to whether LIRR reasonably accommodated him.

b. Horsey

Horsey contends that she was terminated solely because of her disability in that her disability prevented her from attending required medical exams and disciplinary hearings. However, she offers no explanation as to why she was unable to contact LIRR by phone or in writing to request a postponement of the appointments or hearings or to explain why she was unable to appear. This court in Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 514 (2d Cir. 1991), cert. denied, 113 S. Ct. 54 (1992), held that an employer may not discharge an employee solely because of his or her handicap. In that case, we concluded

that an issue of material fact was presented whether the absenteeism for which Teahan was dismissed resulted solely from his handicap of alcoholism. The facts in this case are clearly distinguishable from Teahan, since Horsey was not discharged solely because of her disability. Rather, she was discharged solely for her insubordination. Thus, the district court properly dismissed Horsey's claim.

Statute of Limitations Issues with respect to Claims of Robinson, Gonzalez, and Wayne

The next issue on appeal is whether the district court properly held that the claims of Robinson, Gonzalez, and Wayne were barred by a three-year statute of limitations. Robinson's Gonzalez's, and Wayne's claims were brought under Section 504 of the Rehabilitation Act. 29 U.S.C. §794(a). Section 504 provides:

> [n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The statute does not specify a time limitation for actions brought under this section. When a federal statute fails to specify a limitation period, the court applies the "most appropriate or analogous state statute of limitations." Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987); Morse v. University of Vermont, 973 f.2d 122, 125 (2d Cir. 1992).

In Morse, this court held that the state statute of limitations that applies to personal injury actions applies to discrimination claims brought under Section 504 of the Rehabilitation Act. 973 F.2d at 127. Thus, though the district court applied New York's three-

year statute of limitations applicable to statutory actions, N.Y. CPLR § 214(2), we uphold its ruling on the ground that the claims were barred by New York's three-year statute of limitations for personal injury actions, N.Y. CPLR § 215(5). Gonzalez's and Wayne's argument that the six-year statute of limitations for state contract actions should apply ignores the Morse decision. Thus, the district court properly dismissed their claims as untimely.

Robinson concedes that his claim is governed by a three year statute of limitations but argues that his claim was timely filed because he wasn't officially terminated until 1985 and, in any case, his grievance proceeding tolled the limitations period. Under federal law, a claim accrues when the plaintiff knows or has reason to know of

the injury that is the basis of the action. Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983). Thus, "the timeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision." O'Malley v. GTE Serv. Corp., 758 F.2d 818, 820 (2d Cir. 1985). The record on appeal shows that Robinson was terminated in 1980, when his FELA action was concluded and LIRR refused to return him to duty. Indeed, at that time Robinson wrote to LIRR's President complaining of his termination and asking for a new job and later accepted employment with several different employers. Thus, the district court properly concluded that there was no genuine issue of fact as to the date of Robinson's discharge.

The district court also was correct in holding that Robinson's grievance

proceeding did not toll the limitations period. The record shows that the alleged discriminatory discharge took place in 1980 and that Robinson was aware of the discharge at that time.[2] The fact that Robinson grieved his termination does not affect the accrual date of his discrimination claim and does not toll the applicable statute of limitations. Morse, 973 F.2d at 125. Thus, the district court properly dismissed Robinson's claim as untimely.

Application of Judicial Estoppel to Lyons' Claim of Discrimination

The last issue on appeal is whether the district court properly dismissed appellant Lyons' claim under the doctrine of judicial estoppel. The

[2]While there is a notation in Robinson's service record indicating that he was dismissed in October 1985, the balance of the record supports the district court's ruling that Robinson was terminated in 1980.

doctrine of judicial estoppel prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding. The doctrine has not been uniformly adopted by federal courts and its elements have never been clearly defined in this Circuit.[3]

Unlike equitable estoppel, which is designed "to ensure fairness in the relationship between parties," Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980), judicial estoppel protects the sanctity of the oath and

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[3] Although several district courts have addressed the doctrine, only three Second Circuit opinions have discussed it in detail. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 114 (2d Cir. 1990); Young v. U.S. Dep't of Justice, 882 F.2d 633, 639-40 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990); Sperling v. United States, 692 F.2d 223, 227-29 (2d Cir. 1982) cert. denied, 462 U.S. 1131 (1983).

the integrity of the judicial process. Thus, there are two distinct objectives behind judicial estoppel, both of which seek to protect the judicial system. First, the doctrine seeks to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions.[4] Preserving the sanctity of the oath prevents the perpetuation of untruths which damage

[4] This goal is somewhat inconsistent with the spirit of Fed. R. Civ. P. 8(e)(2), which permits alternative and inconsistent pleading. For this reason, the Tenth Circuit has rejected the doctrine of judicial estoppel. See Chrysler Credit Corp. v. County Chrysler, Inc., 928 F.2d 1509, 1520 n.10 (10th Cir. 1991); Parkinson v. California Co., 233 F.2d 432, 438 (10th Cir. 1956); see also Douglas W. Henkin, Comment, Judicial Estoppel--Beating Shields into Swords and Back Again, 139 U. Pa. L. Rev. 1711 (June 1991) (arguing that doctrine should be abandoned because it conflicts with goals behind systems that permit or encourage inconsistent and alternate pleading and because Fed. R. Civ. P. 11 is adequate to sanction attorneys who have abused the oath).

public confidence in the integrity of the judicial system. Second, the doctrine seeks to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings. see Rand B. Boyers, Comment, Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel, 80 Nw. U.L. Rev. 1244, 1250-58 (Spring 1986) (discussing various rationales behind doctrine).

By focusing on the rationales behind judicial estoppel, the elements of the doctrine become clear. First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner.[5]

[5] The Second Circuit follows the majority view with respect to the second

The first element of the doctrine is applied easily to this case. Lyons argued that he was permanently disabled from physical labor in his previous FELA action, yet now argues that he is not permanently disabled and should be reinstated.

The second element, on the other hand, is not satisfied by the facts of this case. Lyons' FELA action settled before the jury rendered a verdict on damages. A "'settlement neither requires nor implies any judicial

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element of judicial estoppel. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis, 903 F.2d 109, 114 (2d Cir. 1990).

"Under the minority view, judicial estoppel has been applied notwithstanding that a party was not successful in asserting its position in the prior judicial proceeding, if the court determines that the alleged offending party engaged in 'fast and loose' behavior which undermined the integrity of the court." See Stevens Technical Services, Inc. v. SS Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989).

endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel.'" Universal City Studios v. Nintendo Co., 578 F. Supp. 911, 921 (S.D.N.Y. 1983) (quoting Konstantinidis, 626 F.2d at 939); See also Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982) ("if the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted"). Since there was no judicial acceptance of Lyons' claim of permanent disability, there was no basis for the district court to apply judicial estoppel to Lyons' Rehabilitation Act claim. Accordingly, the decision of the district court must be reversed on this issue.

## CONCLUSION

For the reasons set forth above, the decision of the district court is AFFIRMED as to plaintiffs Abrams, Horsey, Robinson, Gonzalez, and Wayne; and REVERSED and REMANDED as to plaintiffs Bates, Butler, Salva, and Lyons.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of July, one thousand nine hundred and ninety-three.

PRESENT: HON. JON O. NEWMAN
HON. J. DANIEL MAHONEY,
Circuit Judges.
HON. WARREN W. EGINTON,*
District Judge.

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JOHN BATES, JAMES BUTLER,
VINCENT GONZALEZ, FLOSSIE HORSEY,
HENRY ROBINSON, ANTONIO SALVA,
ALAN WAYNE, JOSEPH ABRAMS,
AND MALACHY LYONS, JR.,
individually and on behalf of
all others similarly situated,

Plaintiff-Appellants,

-v.- Docket #92-9308

LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

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* Honorable Warren E. Eginton, Senior Judge, United States District Court for the District of Connecticut, sitting by designation.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is affirmed in part and reversed and remanded in part to the said district court for further proceedings in accordance with the opinion of this Court.

ELAINE B. GOLDSMITH, Clerk
By: /s/Edward J. Guardaro
Edward J. Guardaro,
Staff Attorney

This Document was
entered on the
Docket on 7/2/92
Issued as Mandate
July 23, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JOHN BATES, JAMES BUTLER, VINCENT GONZALEZ, FLOSSIE HORSEY, JAMES MAHER, HENRY ROBINSON, ANTONIO SALVA, ALAN WAYNE, JOSEPH ABRAMS, and MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

CV87-2661
MEMORANDUM AND ORDER

Plaintiffs,

-against-

LONG ISLAND RAIL ROAD COMPANY,

Defendant.
----------x

THE JACOB D. FUCHSBERG LAW FIRM
(Mark G. Sokoloff, Esq., of counsel)
New York, New York
for plaintiffs

THOMAS M. TARANTO, ESQ.
(Sharon Patterson Domingo, Esq., of counsel)
Jamaica, New York
for defendants

NICKERSON, District Judge

Plaintiffs are former employees of defendant Long Island Rail Road. In this action, they claim that defendant wrongfully terminated them in violation

of Section 504 of the Rehabilitation Act of 1973 (the Rehabilitation Act), 29 U.S.C. §794, and the Federal Employers' Liability Act (the Employers' Act), 45 U.S.C. §51 et seq.

Defendants move to dismiss the complaint, or in the alternative for summary judgment. Plaintiffs move for class certification.

Plaintiffs filed the complaint on July 31, 1987. On September 29, 1987, they served an amended complaint. After the parties filed the motions now at issue, the court granted leave to serve a second amended complaint. Plaintiffs' counsel then agreed to the dismissal of James Maher's claims.

The second amended complaint alleges that defendant discriminated against the plaintiffs by terminating each solely on the basis of a physical handicap even though each was "otherwise

qualified" within the meaning of the Rehabilitation Act. Plaintiffs also say that defendant terminated them in retaliation for their bringing of, and in some instances prevailing in, actions under the Employers' Act.

The second amended complaint mentions the Railway Labor Act, 45 U.S.C. §153 (p) and (q), by the court does not read it as attempting to state a claim under that act. Those sections refer to a review of orders of an Adjustment Board under the Railway Labor Act, and the pleading does not comply with the statutory prerequisites for such review.

The court will discuss the specifics of the claims of the nine remaining plaintiffs to the extent those details are pertinent to the issues of law. All plaintiffs seek reinstatement, lost seniority, back wages, interest and

lost benefits.

I.

Defendant asks for dismissal of the claims of plaintiffs Robinson, Gonzalez, and Wayne under Section 504 of the Rehabilitation Act on the ground that the claims are barred by the statute of limitations.

Section 504 does not provide a statute of limitations. The court therefore refers to the analogous state-law limitations period, see, Burnett v. Grattan, 468 U.S. 42, 49, 104 S. Ct. 2924, 2929 (1984), namely, the three year period provided by New York Civil Practice Law and Rules §214-(2) for actions to recover upon a liability created by statute. See Marin v. New York State Dep't of Labor, 512 F. Supp. 353, 355 (S.D.N.Y. 1981).

Defendant discharged Robinson in May of 1980, and Wayne in October 1982.

Gonzalez retired in November 1982. The complaint was served in July 1987, more than three years later. Plaintiffs' brief says that Robinson's engagement in grievance procedures tolled the statute. The pendency of a grievance does not do so. See Delaware State College v. Ricks, 449 U.S. 250, 261, 101 S. Ct. 498, 506 (1980) ("the pendency of a grievance, or some other method of collateral review of an employment decision, does not toll the running of the limitations periods").

The Rehabilitation Act claims of Robinson, Gonzalez, and Wayne will be dismissed.

II.

Defendants seek summary judgment on the Rehabilitation Act claims of the remaining plaintiffs on the ground that they have submitted nothing to show they were "qualified" to perform the

essential functions of their former positions.

The court may grant summary judgment if the evidence establishes "that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The burden of making this showing rests on the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970). The court views the record in the light most favorable to the party opposing the motion, United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 994 (1962), and resolves all ambiguities and draws all reasonable inferences in favor of that party. Donohue v. Windsor Locks Bd. of Fire Comm'rs., 834 F.2d 54, 57 (2d Cir. 1987).

Section 504 of the Rehabilitation Act provides in pertinent part:

No otherwise qualified

> individual with handicaps in the United States ... shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....

To establish a prima facie case under this section, plaintiffs must prove: 1) they are handicapped persons within the meaning of the Act; 2) they are "otherwise qualified" for the particular positions they held; 3) the defendant discharged them from those positions "solely" by reason of their handicaps; and 4) the defendant receives federal financial assistance. See Sedor v. Frank, 756 F. Supp. 684, 686 (D. Conn. 1991). Defendant admits that it receives federal aid.

The second amended complaint asserts that defendant discharged Horsey because she missed an appointment with defendant's medical department and did

not appear at the resulting disciplinary hearing. Horsey claims that this action violated the collective bargaining agreement with her union. Since she was not discharged "solely" by reason of her handicap the court will dismiss her §504 claim.

Plaintiffs have no basis for claiming, and the second amended complaint does not claim, that defendant was obligated to assign them to different positions with "light duty." The applicable federal regulation defines, in pertinent part, a "qualified handicapped" individual under §504 as follows:

> Qualified handicapped person means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question. (Emphasis supplied) 29 C.F.R. §1613.702(f).

Plaintiffs must show that they are

qualified despite their handicaps for the position from which defendant discharged them. See Dancy v. Kline, 639 F. Supp. 1076, 1079 (N.D. Ill. 1986).

Plaintiffs may only prevail if they offer evidence that, at the time of their dismissal, they could have performed the "essential functions" of those positions with reasonable accommodation by the employer. See School Board of Nassau County v. Arline, 480 U.S. 273, 287 n. 17, 107 S. Ct. 1123, 1131 n. 17 (1987). By those criteria certain of the plaintiffs were plainly not "qualified" to perform the job from which they were discharged.

Bates worked for defendant as a pipefitter. His physician testified at the Employers' Act trial in January 1985, three months before Bates's dismissal on April 13, 1985, that he

would be unable to continue working as a pipefitter because his ankle injury prevented him from performing the requirements of the job including climbing and carrying. The doctor also testified that it would have done no good for defendant to accommodate Bates by assigning him a task which only required him to stand and cut lengths of pipe because his ankle prevented him from even staying in one position for any length of time.

Bates's affidavit does not dispute that at the time defendant discharged him, his doctor had indicated that he could not continue as a pipefitter. The affidavit says only that in "late 1985," after his discharge, a physician had evaluated him as able to do the essential functions of his job.

Bates's claim under §504 will be

dismissed.

Defendant employed Butler as a car appearance maintainer and discharged him on December 2, 1986. At Butler's Employers' Act trial in the fall of 1986, his physician testified that he could not return to that job because the dust and fumes associated with it severely aggravated his asthma. Even if Butler wore a mask, the witness testified, it would make no significant difference. Butler does not dispute that at the time of his discharge he could not return to his former position but argues that he should have been given a different position.

Butler's claim under §504 will be dismissed.

Defendant employed plaintiff Abrams as an electrician, and discharged him on April 22, 1986. He had been out sick

since September 27, 1982. As of August 20, 1985, according to defendant, he said that he could only sit for between ten to thirty minutes and spent most of the day lying down, that he could not lift or climb, and that he was in "continuous pain."

When defendant discharged him in April 1986 it had received a report to be offered by him in his Employers' Liability Act action saying that he could never return to work as an electrician.

On April 21, 1986 the doctors for defendant examined Abrams and found that he would not be capable of resuming service in any capacity in any of the job classifications for which he held seniority. Although the second amended complaint says that his physician furnished him with written permission to

return to work, he has failed to substantiate that claim by affidavit or otherwise.

The court will dismiss Abrams' §504 claim.

The court need not address defendant's contention that Abrams, Bates, and Butler are estopped from asserting their §504 claims. Cf. Scarano v. Central R. Co. of New Jersey, 203 F.2d 510 (3rd Cir. 1953).

Plaintiff Salva was employed as a car appearance maintainer. On August 5, 1984 he sustained a shoulder injury and went out on sick leave. He had been lifting bags of ice over his head to put in parlor cars and thereby aggravated previous injuries to his shoulder. He testified at his Employers' Act trial that after he went on sick leave he visited a Dr. Carlos Timm, who saw him

once and referred him to a Dr. Jacob Lehman. In November or December of 1984, Dr. Lehman discharged Salva, saying he could go back to work if he did no lifting over his head.

On May 7, 1985 defendant terminated Salva on the basis of a medical examination by its physician and with the concurring medical opinion of defendant's "independent consulting physician" that Salva was unable to resume service in the job classification for which he held seniority, that is, he was unable to perform the overhead lifting activities necessary for a car appearance maintainer.

On his behalf the union appealed in accordance with the grievance procedure under the applicable collective bargaining agreement and the Railway Labor Act. The Public Law Board of the

National Mediation Board later held that the termination was proper and denied his claim to be reinstated as an employee.

On May 13, 1985 Salva brought an action in this court under the Employers' Act. He demanded $5,000,000 and alleged he had suffered "serious permanent and painful injuries" and "has lost and will lose wages in his usual occupation."

The record in the present case includes the deposition of Salva in his Employers' Act case. He testified as to the type of duties he had performed as a car appearance maintainer. Among other things, he mopped floors, which required him to lift buckets of water weighing about fifty pounds. For several years he worked on Montauk branch. There, besides his other duties as a car

appearance maintainer, he loaded ice on the parlor cars. As Salva put it at his deposition, "it's classified as a car cleaner in Montauk" as the one to "put the ice on the train," which required lifting the bags of ice above one's head to put them on a platform.

Salva has submitted an affidavit in this action reciting, among other things, that on February 8, 1985, before he was terminated, "Dr. Timm examined me and determined 'I was better' with 'no pain in my left shoulder and that I could return to sedmentary [sic] at any time.' " The dictionary does not contain the word "sedmentary." The court speculates that "sedentary" was intended by the author of the affidavit, which has the marks of having been drafted by a lawyer and which was sworn to before the same notary as plaintiffs

Robinson, Lyons, and Bates swore before.

There seems to be no doubt that at the time of his termination Salva could do no lifting above his head. Whether or not he had even further restrictions and whether they confined him to sedentary work is unclear on this record. In addition, the record is not clear as to the extent to which the "essential functions" of the position of a car appearance maintainer at the time of his termination required him to lift above his head.

The court will at this time deny summary judgment on Salva's claim without prejudice to the submission of further proof on these questions.

Plaintiff Lyons was hired in 1972 as a trackman. He was injured in September 1983, returned to work on October 15, 1984, and aggravated his

condition that same day and "marked off." His affidavit states that on October 31, 1985 he reported to defendant, tendering a note from his physician, Dr. Lehman, approving him "back to full duty." On December 18, 1985 the defendant terminated him based on a review of his own and his doctor's testimony at the trial of his Employers' Act case (which commenced in October 1985) that he could not return to work "due to a permanent disability."

The transcript of that testimony is not included in the record. Indeed, the record does not contain reports from the doctors for either Lyons or defendant. The court will at this time deny summary judgment on this claim without prejudice to submission of further proof.

III.

The complaint also says that

defendant violated the Employers' Act by discharging plaintiffs Abrams, Bates, Butler, Lyons, Robinson, and Salva, in retaliation for filing Employers' Act claims.

This contention is insufficient. The Employers' Act contains no provision for a right of action for retaliatory discharge. See, e.g., Mayon v. Southern Pacific Transp. Co., 805 F.2d 1250, 1252 (5th Cir. 1986). Courts have consistently declined to infer one, given the extensive wrongful discharge remedies provided by the Railway Labor Act. See, e.g., Graf v. Elgin, Joliet and Eastern Ry. Co., 790 F.2d 1341, 1348 (7th Cir. 1986); Davidson v. Long Island R.R. Co., 617 F. Supp. 67, 69 (S.D.N.Y. 1985).

Defendants are entitled to summary judgment on the retaliatory discharge

claims.

IV.

Plaintiffs move under Rule 23 of the Federal Rules of Civil Procedure to certify a class of all of defendant's union employees who have been discharged in the past five years or will be discharged, after filing an Employers' Act claim.

The proposed class cannot satisfy the numerosity requirement of Rule 23(a). The affidavit of defendant's Director of Labor Relations states that there are at most eight persons besides the named plaintiffs who could be included in the proposed class.

Furthermore, the claims under §504 of the Rehabilitation Act turn on specific matters of fact as to each plaintiff and not on issues of law generally applicable to the proposed

class. The court has rejected plaintiffs' legal contention under the Employers' Act.

V.

Defendant's motion for summary is granted against all plaintiffs, except for the claims of plaintiffs Lyons and Salva under §504 of the Rehabilitation Act. As to these two claims defendant may submit further proof within thirty days of the date of this memorandum and order. Plaintiff may have fifteen days thereafter to respond.

Plaintiffs' motion for class certification is denied.

So ordered.

Dated: Brooklyn, New York
September 25, 1991

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

JOHN BATES, JAMES BUTLER, VINCENT GONZALEZ, FLOSSIE HORSEY, JAMES MAHER, HENRY ROBINSON, ANTONIO SALVA, ALAN WAYNE, JOSEPH ABRAMS, and MALACHY LYONS, JR., individually and behalf of all others similarly situated,

Plaintiffs,

-against-

LONG ISLAND RAIL ROAD COMPANY,

Defendant.
----------X

87 CV 2661

MEMORANDUM AND ORDER

THE JACOB D. FUCHSBERG LAW FIRM
(Mark G. Sokoloff, of counsel)
New York, New York
for plaintiffs

THOMAS M. TARANTO
(Sharon Patterson Domingo, of counsel)
Jamaica, New York
for defendant

NICKERSON, District Judge

Plaintiffs, former employees of defendant Long Island Railroad, brought this action claiming that defendant wrongfully terminated them in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 et seq.

By Memorandum and Order dated September 25, 1991 (the 1991 Order), familiarity with which is assumed, the court denied plaintiffs' motion for class certification, and granted defendant's motion for summary judgment dismissing the claims of all plaintiffs, except the claims of plaintiffs Lyons and Salva under Section 504 of the Rehabilitation Act. As to those plaintiffs both parties had permission

to submit further proof, which they have done.

Defendant now argues that summary judgment should be granted dismissing the claims of Lyons and Salva. Plaintiffs also move for reargument of the entire motion for summary judgment.

I

In their motion for reargument plaintiffs say that the court erroneously cited a regulation and thus applied an incorrect definition of a "qualified handicapped individual."

In defining "qualified handicapped individual" the court cited 29 C.F.R. §1613.702(f), which provides:

"Qualified handicapped person"

> means...a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question."

As plaintiffs point out, that provision applies to the federal government and not to private employers. Plaintiffs say that the provision relevant to this action is 29 C.F.R. § 32.3, which applies to employers who receive federal financial assistance. The parties do not dispute that defendant receives such assistance.

29 C.F.R. § 32.3 defines "qualified handicapped individual" as:

> an individual with a handicap who is capable of performing the essential function of the job or jobs for which he or she is being considered with reasonable accommodation to his or her handicap.

"Reasonable accommodation" means "changes or modifications which can be made in the structure of a job...or in the manner in which a job is performed," and may include making facilities more accessible, changing work schedules, acquiring new equipment, or restructuring jobs. 29 C.F.R. § 32.3.

The court should have cited 29 C.F.R. § 32.3 rather than 29 C.F.R. § 1613.702(f). The two definitions are in substance the same, and the result is the same under either provision. Both define qualified handicapped individual to mean one who can perform the "essential functions" of the job with "reasonable accommodation."

Plaintiffs argue that there is a

difference because 29 C.F.R. § 32.3 refers to the essential function of the "job or jobs for which [an individual] is being considered," while 29 C.F.R. § 1613.702(f) refers to the essential functions of the "position in question." Plaintiffs say that § 32.3 should be read to mean that each plaintiff is entitled to be given any job he was qualified to hold within his craft, even though he could not perform in his own position. Such an interpretation could only cause chaos in the work force. The court will not do that or infer from the language that more accommodation is required of private employers receiving federal financial assistance than is required of

the federal government.

As the court made clear in the 1991 Order, plaintiffs are entitled to prevail only if they offer evidence that they could have performed the essential function of their previous positions with reasonable accommodation by the employer. Slip op. at 7.

Reasonable accommodation does not require an employer to place a handicapped employee in a different job requiring similar skills, but only that the employer change the conditions of the workplace or the structure of the job so that the handicapped individual can perform the essential functions of the position. See Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987) (reasonable

accommodation does not require reassignment to light duty position). Based on that standard the court found that plaintiffs Bates, Butler and Abrams were unable to perform their jobs even with reasonable accommodation from defendant.

They ask the court to reconsider that determination, and they submit after-thoughts in additional affidavits.

With respect to Butler plaintiffs submit affidavits of a Dr. Sheldon Zuckerman and a Tom Dorsa, who says he is the "Union Chairman" for Butler. Neither of these affidavits is pertinent to the holding of this court. Neither suggests that Butler could perform the job that he held at the time in

question, namely, floor preparer.

As defendant stated in a prior affidavit, it told Butler to exercise his bidding rights to a different job, one that took account of his disability, but he refused to do so.

Bates's job had been that of pipefitter, a task that required climbing and carrying. The new affidavits on his behalf by a Dr. Frank P. Vaccarino and a Gregory Wenchell claim not that he could do his previous job but that he could do some other job that required only sitting.

As to Abrams plaintiffs submit the affidavit of a Dr. Kamran Tabaddor, who performed a laminectomy and diskectomy on Abrams in 1984. Dr. Tabaddor granted

Abrams permission to return to work on February 12, 1987, some ten months after Abrams's employment was terminated on April 22, 1986. In a very brief affidavit dated January 20, 1992, nearly six years after Abrams's termination, Dr. Tabaddor opines that Abrams could have performed the "essential functions" of his position as electrician as "his restrictions by that time were minor, if any." In contrast to Dr. Tabaddor's opinion, about three weeks before his termination Abrams submitted a report to be offered as damages in the trial of his FELA claim. That report said he could never return to work. Dr. Tabaddor's present opinion is therefore insufficient to raise a genuine issue of

material fact.

In 1988 Abrams's union claimed that the defendant had violated the collective bargaining agreement by terminating him. In August 1988 a Public Law Board sustained the claim in part. It directed that, in light of the conflicting evidence as to Abrams's fitness for duty, he should be examined by defendant's doctor and, if Abrams contested that doctor's opinion, by a Board of Doctors. If either defendant's doctor or the Board of Doctors found him to be capable of returning to duty, he was to be restored to duty.

The Board made it a prerequisite to implementation of its findings that Abrams "forfeit" any rights he had under

FELA. The Board also decided that, given the conflicting evidence, no back pay was due.

Defendant's doctor concluded in March 1989 that Abrams could return to work but because of his surgery his return was to be subject to restrictions of a permanent nature "in regards to constant bending, kneeling, pushing, or pulling" and to a prohibition against lifting more than 50 to 60 pounds.

As of December 22, 1989 defendant restored Abrams to service with full seniority and back pay. He resumed work on June 6, 1990 with permanent restrictions and was assigned to inspecting periodically air conditioning and heating equipment. This is a

different position from the one he held before his discharge.

For reasons already stated the court holds that Section 504 does not require defendant to place a handicapped employee in a different job from that which he previously held. Thus, as a result of the claim under the collective bargaining agreement, Abrams has received more favorable treatment than the statute demands.

The court has carefully considered all of plaintiffs' arguments for reconsideration of the 1991 Order, but modifies its decision only as stated above.

II

Plaintiff Lyons, who worked for defendant as a track foreman, says defendant fired him without evaluating whether he could perform the "essential function" of the job or offering him any accommodation.

Before bringing this lawsuit Lyons sued defendant under the FELA alleging a permanent disability. Lyons v. Long Island R.R., No. 84 CV 3659 (E.D.N.Y.). At the trial of that action both Lyons and his doctor, Dr. Martin Lehman, testified that Lyons was permanently disabled from his job. Defendant's consulting physician, Dr. William A. Healy, testified that Lyons could return

to work.

On September 24, 1985, the jury had already decided the issue of liability and then heard evidence as to damages. Before the verdict, the parties settled Lyons' FELA claim for $98,000. On December 11, 1985, defendant terminated Lyons' employment based on his representations of disability at trial. Lyons now says this termination was improper because he was fully able to work.

In support of its motion for summary judgment defendant submitted a transcript of the testimony of Lyons and Dr. Lehman at the FELA lawsuit. Dr. Lehman then stated that Lyons had a permanent disability in the use of his

left arm and was unable to lift or carry anything weighing more than a flashlight. He did not anticipate a recovery. Lyons testified that as a relief foreman he had to do some physical labor almost every day. After his injury, he said, any kind of movement in his shoulder caused him pain. Even when he was assigned a non-physical job requiring driving in a truck, the pain was so bad that he asked to go home.

In opposition to this motion Lyons submitted Dr. Healy's medical evaluation and a portion of his testimony to show that Lyons had no medical condition preventing him from doing heavy lifting. Lyons also submitted an

affidavit from Dr. Lehman, who now says that at the time of the termination Lyons was "more than capable of fully performing [his job]..., even without a 'reasonable accommodation' offered to him" by defendant. Dr. Lehman says he testified at the FELA trial that Lyons was fully able to return to work, but neither he nor Lyons points to any statement to that effect by Dr. Lehman in the trial transcripts.

Dr. Lehman's present statement contradicts his sworn testimony in 1985. The only other evidence that Lyons was not disabled from his position is Dr. Healy's medical reports and testimony, which Lyons challenged in his own sworn testimony.

Defendant relies on the doctrine of "judicial estoppel" to argue that Lyons should be estopped from contradicting his prior testimony. That doctrine precludes a party from asserting in one action a position contrary to that successfully argued in another action.

In Stevens Technical Services, Inc. v. SS Brooklyn, 885 F.2d 584, 588-89 (9th Cir. 1989), the Ninth Circuit identified two competing views of judicial estoppel. In some courts judicial estoppel will bar a claim upon a finding that the offending party engaged in "fast and loose" behavior which undermined the integrity of the judicial system. See, e.g., Scarano v. Central R.R., 203 F. 2d 510, 512-513 (3d

Cir. 1953); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211-213 (1st Cir. 1987).

In other circuits judicial estoppel is limited to cases where the inconsistent assertion in the subsequent litigation was adopted in some manner by the court in the prior litigation. Stevens, 885 F.2d at 588. For example, the Fourth Circuit noted that "[t]hough perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, [judicial estoppel] is obviously more appropriate in that situation." Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982). See also Edwards v. Aetna Life Ins. Co.,

690 F.2d 595, 599 (6th Cir. 1982) ("[i]f the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted."); Matter of Cassidy, 892 F.2d 637, 641 (7th Cir. 1990) (party must have convinced court to accept its position).

In 1983 the Second Circuit declined to determine whether the doctrine of judicial estoppel should be accepted. United States v. Bedford Assocs., 713 F.2d 895, 904 (2d Cir. 1983) (declining to state "whether or not the principle [of judicial estoppel] is...recognized in this Circuit"). But in two recent decisions the Second Circuit recognized the principle without identifying the

circumstances in which it would apply.

In Young v. United States Dep't of Justice, 882 F.2d 633, 639 (2d Cir. 1989), cert. denied, 493 U.S. 1072 (1990), the court described judicial estoppel as a doctrine that "may prevent a party who benefits from the assertion of a certain position, from subsequently adopting a contrary position" with the purpose of preventing litigants from playing "fast and loose" with courts. The court did not apply judicial estoppel due to the absence of the "key ingredient" of reliance on the part of either the court or the litigant who sought to invoke the principle. "What occurred...[was] quite different from a situation in which a party has obtained

favorable relief with an implicit but misleading representation to a court that he would not subsequently switch positions." Id. at 639-40.

In a brief passage in Merrill Lynch v. Georgiadis, 903 F.2d 109, 113-114 (2d Cir. 1990), without mentioning Young, the court described judicial estoppel as limited to cases where a party who actually obtained a judgment as a result of the inconsistent position, and unavailable when the prior action was dismissed by stipulation. In that case a Merrill Lynch customer sought to estop the corporation from asserting rights that it had chosen not to pursue in a similar action brought by a different customer. This court does not read

Merrill Lynch to abandon the concern stated in Young that a court should not permit a litigant who "benefits" from its position in one action to play "fast and loose" with the judicial system.

At the core of the doctrine of judicial estoppel is the view that a party undermines the integrity of the judicial system by using it to advance wholly inconsistent claims. Because judicial estoppel protects the integrity of the system in addition to litigants, the party seeking to invoke it need not show that it relied on or was prejudiced by the prior assertion. See Edwards, 690 F.2d at 598; Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cri. 1980).

Nor does this court believe that

the inconsistent position must be adopted explicitly by the court in a prior proceeding. It is enough that with the help of the judicial process one party benefitted from its assertion in an earlier proceeding if the court also determines that the party is playing "fast and loose" with the judicial system. Young, 882 F.2d at 639; Scarano, 203 F.2d at 513 & n.3; AFN, Inc. v. Schlott, Inc., ____ F.Supp. _____, 1992 WL 164205 *4-7 (D.N.J. July 14, 1992). Perhaps because the Merrill Lynch case did not involve such conduct, the court there focused on the absence of a judgment when it refused to apply judicial estoppel.

In the case of Lyons the parties

settled after a jury had reached the issue of liability and was determining the amount of damages. Even though the action was ultimately resolved through a settlement Lyons clearly benefitted from the position he took and his testimony at trial. Because that court was sufficiently involved in Lyons' recovery, this court may invoke the doctrine of judicial estoppel to prevent Lyons from playing "fast and loose" with the courts by litigating a claim that directly contradicts his own prior trial testimony against this defendant in a prior action. His claim is dismissed.

III

Plaintiff, Salva, who worked for defendant as a car appearance maintainer, also claims that defendant terminated him without offering reasonable accommodation.

Salva brought an FELA claim against defendant, which was ultimately settled for less than $50,000. He testified in his FELA case that his duties included lifting buckets of water weighing about fifty pounds and also lifting bags of ice to put them on trains. Defendant has submitted evidence that after Salva's injury his doctors advised him that he could return to work that did not require "overhead activities" or

heavy lifting.

Salva says that various car appearance maintainer positions do not require such lifting. But according to defendants' Assistant Chief Mechanical Officer William J. Dietz, although car appearance maintainers may not be called upon to perform all tasks at all times, each must be able at all times to do so because the applicable collective bargaining agreement provides that all represented positions are assigned on the basis of seniority. Defendant cannot be held liable if it had insufficient say as to individual job assignments to make the accommodations Salva sought. See Carter, 822 F.2d at 467-468; Bento v. I.T.O. Corp. of Rhode

Island, 599 F.Supp. 731, 745 (D.R.I. 1984).

Salva submitted in further opposition to defendant's motion for summary judgment an affidavit of Dr. Jacob Lehman, who in November 1985 had advised Salva to return to work with "no prolonged lifting," and in February 1985 approved his return to sedentary work. Dr. Lehman now says that in his opinion Salva "could sweep, climb into railroad cars, and lift a forty pound bucket of water five feet without any restrictions at the time of his administrative discharge, as long as said lifting was not over his head" (emphasis in original). Given the evidence that Salva was unable to do prolonged or

heavy lifting and Dr. Lehman's recommendation in 1985 that Salva return to sedentary work, Dr. Lehman's present statement is insufficient to raise a genuine issue of material fact.

The 1991 Order is modified as stated above, but plaintiffs' motion for reargument is otherwise denied. Defendant's motion for summary judgment is granted against Salva and Lyons. The complaint is dismissed.

So ordered

Dated: Brooklyn, New York
September 21, 1992

/s/Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Section 504 provides, in pertinent part:

§ 794. Nondiscrimination under federal grants and programs; promulgation of rules and regulations

(a) Promulgation of rules and regulations.

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of

1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.
29 U.S.C. § 794 (a)(1990).

Section 1 of the Railway Labor Act provides, in pertinent part:

§151. Definitions; short title
When used in this chapter and for the purposes of this chapter -
First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or

performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "Carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of

the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

* * *

Fifth: The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined

as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such

individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

45 U.S.C. § 151.

Section 1a of the Railway Labor Act provides, in pertinent part:

§ 151a. General Purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any

denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. § 151(a)

Section 2 of the Railway Labor Act

provides, in pertinent part:

§ 152. General Duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. §152.

Section 3 First of the Railway Labor Act provides, in pertinent part:

First: Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

* * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data

bearing upon the disputes.

* * *

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret

the award in the light of the dispute.

* * *

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive

on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: Provided, however, That such order may not be set aside except for failure of the division to comply with the requirements of this

chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

45 U.S.C. §153 First (i), (j), (m), (p).

Section 3 Second of the Railway Labor Act provides, in pertinent part:

> Second. System, group or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards
>
> Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the

establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a

request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such

request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and

compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either

member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

45 U.S.C. §153 Second

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASE, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

MONTEREY DEVELOPMENT CORPORATION, Appellant, v. LAWYER'S TITLE INSURANCE CORPORATION, Appellee. No. 93-1191. United States Court of Appeals, Eighth Circuit. Submitted: June 14, 1993. Filed: September 1, 1993.

Appeal from the United States District Court for the Western District of Missouri.
Before WOLLMAN AND LOKEN, Circuit Judges, and BOGUE, [FN*] Senior District Judge.

FN* The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

WOLLMAN, Circuit Judge.

*1 Monterey Development Corporation ("Monterey") appeals from the district court's [FN1] dismissal of its claim against Lawyer's Title Insurance Company ("Lawyers Title") for breach of a title insurance policy. Monterey and its president, Gary Fuller, also appeal from the district court's imposition of civil contempt sanctions. Counsel for

Monterey, Kevin Curran, appeals from the district court's imposition of sanctions under Federal Rule of Civil Procedure 11 for signing a frivolous complaint. We affirm.

I.

This litigation involves the tangled history of a parcel of real property in Greene County, Missouri. In January 1988, General Electric Capital Corporation ("G.E. Capital") filed a lawsuit in the District Court for the Western District of Missouri, seeking, among other relief, to foreclose on a deed of trust on the property dated January 23, 1985. (The original lawsuit will be referred to as "Case 88-3018"). G.E. Capital named as defendants New Concept Housing, Inc., the owner of the property; several related corporations; and a number of individuals that had executed personal guaranties on New

Concept's debt to G.E. Capital, including Paul Johnson, Geneva Johnson, Stephen Johnson, Carolyn Johnson Wood, and Gary Fuller.[FN2]

On July 21, 1989, G.E. Capital and the various defendants in Case 88-3018 filed with the court a stipulation for judgment on G.E. Capital's claim for foreclosure on its deed of trust. The stipulation provided that G.E. Capital held a valid deed of trust that constituted a "first lien" on the property and that the interest of any of the defendants was subordinate to G.E. Capital's interest. The stipulation further provided that the defendants' obligations to G.E. Capital would be satisfied by selling the property at a private foreclosure sale to Monterey, a new corporation formed specifically for the purpose of buying the property and whose president was Gary Fuller. The

stipulation was signed by defendants Gary Fuller, Paul Johnson, Geneva Johnson, Ron Johnson, and Stephen Johnson, either individually or in a corporate capacity. Pursuant to the stipulation, the district court entered a judgment of foreclosure on July 24, 1989, ordering the sale of the property to Monterey and finding that all of the defendants had "waived and relinquished any redemption or other rights they may have" in the property.

In order to purchase the property, Monterey borrowed $155,000 from State Bank of Polk County ("State Bank"), executing a promissory note and a deed of trust in State Bank's favor. In connection with this loan, Monterey purchased a title insurance policy from Lawyer's Title.

The story does not end so neatly, however. In 1982, Geneva Johnson came

into possession of a deed of trust (the "1970 deed of trust") originally executed by Harry and Nan Mitchell on January 5, 1970, that purported to encumber the property. In January 1989, while G.E. Capital's foreclosure action was pending, Geneva Johnson assigned the 1970 deed of trust to Ron Johnson, who was involved in Case 88-3018 as the President of the defendant Southwest Village Water Company.

*2 On the day after Monterey purchased the property at the private foreclosure sale, Ron Johnson appointed Beverly Hood as successor trustee for the 1970 deed of trust, although Hood at that time was the collection agent for Monterey. Hood attempted a nonjudicial foreclosure on the 1970 deed of trust in October 1989 and sold the property to Empire Development. When Paul Johnson, as President of Empire Development,

presented the successor trustee's deed to Monterey, Gary Fuller, who was also Secretary of Empire Development, surrendered the rents and possession of the property to Empire Development. Several more transactions transferring interests in the property then occurred between Empire Development, Empire Mortgage, and Ron Johnson.

In October 1989, Fuller made a claim on Monterey's behalf against Lawyer's Title for failing to except from coverage the 1970 deed of trust, resulting in the foreclosure by Ron Johnson. State Bank also made a claim against Lawyer's Title arising out of the October 1989 foreclosure.

State Bank then intervened as a plaintiff in Case 88-3018, filing a three-count petition that sought to have the district court set aside Ron Johnson's October 1989 foreclosure and

find certain defendants, including Gary Fuller, in contempt of the court's judgment of foreclosure. Monterey subsequently intervened in the case as well.

On May 30, 1991, the court granted State Bank's motion for summary judgment on counts II and III of its complaint, which involved the nullification of the October 1989 foreclosure. The court's summary judgment order held that the various defendants had signed the stipulation that stated that G.E. Capital held a first lien on the property and that any interest held by the defendants was subordinate to G.E. Capital's lien, thereby extinguishing them. Thus, the court held that the defendants were estopped from claiming that the 1970 deed of trust had priority over G.E. Capital's lien and that it could provide a basis for a foreclosure

after the court's judgment of foreclosure on July 24, 1989. The court ordered several of the defendants, including Ron Johnson, Empire Development, and Empire Mortgage, to file quitclaim deeds relinquishing their rights in the property to Monterey. Monterey thus regained fee simple title to the property. The court did not at that time, however, rule on count I of State Bank's petition, which sought to have certain defendants held in contempt.

Ron Johnson appealed the district court's order. We dismissed the appeal for lack of jurisdiction because not all of the claims in the case had been finally determined, including the contempt claim in Count I. General Elec. Cap. Corp. v. Fuller, No. 91-2937 (8th Cir. Nov. 21, 1991).

The defendants complied with the court's order to file quitclaim deeds,

thereby avoiding the contempt citations sought in Count I of State Bank's petition. During this time, however, Paul Johnson purchased from State Bank Monterey's $155,000 promissory note thereby acquiring State Bank's interest in the litigation. Also during this time, Monterey attempted to fire the counsel that Lawyer's Title had provided for it and retained new counsel. After these events, Monterey, through its new counsel, and the various defendants moved the district court to enter a voluntary dismissal order under Federal Rule of Civil Procedure 41(a). Satisfied that the quitclaim deeds had restored fee simple title to Monterey, the district court dismissed the case without prejudice on February 12, 1992.

*3 Following the dismissal of Case 88-3018, Hood again attempted to foreclose on the 1970 deed of trust.

Monterey, through the counsel provided by Lawyer's Title, filed an application for a temporary restraining order to prevent the new foreclosure. Gary Fuller wrote a letter to counsel, stating that Monterey no longer had title to the property because the deed of trust executed in favor of State Bank had been foreclosed (presumably by Paul Johnson). Consequently, counsel dismissed the application.

Monterey then filed the present lawsuit against Lawyer's Title in Missouri state court, claiming that Lawyer's Title's failure to except the 1970 deed of trust from coverage had caused Monterey to lose possession of the property. Lawyer's Title removed the case to the United States District Court for the Western District of Missouri, and the case was assigned to Judge Clark, who had presided over Case

88-3018. The court dismissed Monterey's complaint, stating that its May 30, 1991 order was a final judgment that had extinguished all junior interests in the property, including the 1970 deed of trust. After a show-cause hearing, the court also imposed a $3,000 fine on Monterey and Gary Fuller for civil contempt, and a $500 fine against Kevin Curran, Monterey's current counsel, for violating Rule 11.

II.

Monterey claims that the district court erred in relying on pleadings, records, and orders found in Case 88-3018 when it dismissed Monterey's complaint in the present case. Monterey argues that the district court's dismissal without prejudice of Case 88-3018 rendered all proceedings on State Bank's petition a nullity, thereby preventing the events in that case from

having a preclusive effect on the present case. Monterey relies on our opinion in In re Piper Aircraft Dist. Sys. Antitrust Lit., 551 F.2d 213 (8th Cir. 1977). We held in that case that the district court had erred in giving preclusive effect to the denial of class action status in another case that had been subsequently dismissed without prejudice pursuant to Rule 41(a)(1). Id. at 219. We stated that "[t]he effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought," reasoning that a dismissal without prejudice does not comply with the requirement of a valid and final judgment, which is necessary for the application of collateral estoppel. Id. at 219-20. Monterey argues that the district court's statement that the May

30, 1991 order was a final judgment reveals that the district court dismissed the present case because it believed that res judicata or collateral estoppel prevented Monterey from litigating the viability of the 1970 deed of trust.

We need not decide, however, whether our holding in In re Piper Aircraft applies to this case. Although we do not believe that the district court's invocation of estoppel was as narrow as Monterey urges, we may affirm the judgment on any ground supported by the record, even if not relied on by the district court. Lane v. Peterson, 899 F.2d 737, 742 (8th Cir.), cert. denied, 498 U.S. 823 (1990). Therefore, as we believe the district court intended in part, we hold that Monterey is prohibited under Missouri law from pursuing a claim against Lawyer's Title

based on the 1970 deed of trust by application of the doctrine of judicial estoppel.

*4 Because this is a diversity case, we must apply the substantive law of Missouri. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); Jackson v. Anchor Packing Co., 994 F.2d 1295, 1301 (8th Cir. 1993). Missouri has long recognized the doctrine of judicial estoppel. See, e.g., Edwards v. Durham, 346 S.W.2d 90, 101 (Mo. 1961). Unlike its related counterparts-collateral estoppel, which prevents repetitive litigation, and equitable estoppel, which prevents contracting parties from asserting contradictory positions to ensure fairness between them - judicial estoppel is "'designed to preserve the dignity of the courts and insure order in judicial proceedings.'" Jeffries v. Jeffries, 840 S.W.2d 291, 294 (Mo. Ct.

App. 1992) (quoting Edwards, 346 S.W.2d at 101); see also Morris v. State of California, 966 F.2d 448, 453 (9th Cir. 1991) ("the purpose of the doctrine is to protect the integrity of the judicial process"), cert. denied, 113 S. Ct. 96 (1992); Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980) ("[t]he object is to safeguard the administration of justice"). Because the doctrine's focus is on the court's integrity, judicial estoppel does not require proof of privity, reliance, or prejudice by the party invoking it. Konstantinidis, 626 F.2d at 937. Judicial estoppel prevents a person who states facts under oath during the course of a trial from denying those facts in a second suit, even though the parties in the second suit may not be the same as those in the first. Bellinger v. Boatmen's Nat'l Bank, 779 S.W. 2d 647, 650 (Mo. Ct. App.

1989) (citing Lillo v. Thee, 676 S.W.2d 77, 81 (Mo. Ct. App. 1984)). "Furthermore, even when the prior statements were not made under oath, the doctrine may be invoked to prevent a party from playing 'fast and loose with the courts.'" Konstantinidis, 626 F.2d at 937 (citing Scarano v. Central R.R., 203 F.2d 510, 513 (3d Cir. 1953).

Gary Fuller, Paul Johnson, Ron Johnson, Geneva Johnson, Empire Development, and Empire Mortgage all executed a stipulation that stated that G.E. Capital held a first lien on the property and that any interest held by the defendants was subordinate to G.E. Capital's interest. Thus, by their admissions, the foreclosure on G.E. Capital's deed of trust extinguished all junior liens on the property, including the 1970 deed of trust. Cf. Sabine v. Leonard, 322 S.W.2d 831, 836 (Mo. banc

1959) (foreclosure of a senior mortgage extinguishes junior mortgage unless the mortgagor acquires full title to the property); Sertoma Building Corp. v. Johnson, No. 18430, 1993 WL 266782 at *3 (Mo. Ct. App. July 19, 1993) (same). Ron Johnson, Geneva Johnson, and the others involved in this scheme knew that the district court's judgment of foreclosure on July 24, 1989, was designed to place fee simple title to the property in Monterey. They represented to the court in the stipulation that they were relinquishing their rights. Whether or not they had transferred their interests in an attempt to hide them from the court, they could no longer claim that the 1970 deed of trust remained a viable lien on the property that could still support a foreclosure after the stipulation and judgment of foreclosure.

*5 Fuller also knew that this was the effect of the stipulation and judgment of foreclosure. Therefore, he knew that the purported foreclosures in 1989 and 1992 were invalid. Nonetheless, following the purported foreclosure in October, 1989, he voluntarily relinquished Monterey's possession of the property to Paul Johnson, his fellow officer in Empire Development.

Despite Fuller's surrender of the property, counsel for Monterey was able to regain possession of the property when the district court granted summary judgment on counts II and III of State Bank's petition in Case 88-3018 and ordered the various defendants to file quitclaim deeds. At that point, Monterey once more had fee simple title to the property, as the district court stated in its order of May 30, 1991. Nonetheless, Fuller thwarted the efforts

of counsel provided by Lawyer's Title and those of the district court to restore Monterey's title. Fuller and Paul Johnson manipulated the litigation so they could obtain a voluntary dismissal, even though the only act remaining to be done to give Monterey the relief it sought was simply to enter judgment on the court's summary judgment order of May 30, 1991.

Fuller and Monterey repeatedly stress that the voluntary dismissal wiped away all of the proceedings in Case 88-3018, especially the May 30, 1991, summary judgment order. Whether that is so or not, it is clear that the various defendants in Case 88-3018 filed and recorded quitclaim deeds in accordance with the court's May 30 order. Those quitclaim deeds thus bore a legal effect independent of the status of Case 88-3018. Despite the fact that the

deeds once more extinguished the 1970 deed of trust and restored Monterey's title, Fuller and Monterey have now attempted to escape the stipulation and the court's orders and, on the basis of the 1970 deed of trust, to force Lawyer's Title to compensate Monterey for its alleged loss of the property.

Fuller and the other original defendants in Case 88-3018, through their various corporations, have attempted to make a mockery of the district court's judgment of foreclosure on G.E. Capital's deed of trust. They have contradicted the intent of the stipulation which supported the court's original judgment of foreclosure and have attempted to play "fast and loose with the court." That the district court recognized the effect of the defendants' machinations on the integrity of the judicial process is made clear by its

statement at the December 18, 1992, hearing on the order to show cause that "I think I have an obligation to uphold the integrity of judgments rendered by this court." We agree with the district court's assessment of the defendants' conduct, and we hold that the district court properly ruled that Fuller and Monterey are estopped from asserting that the 1970 deed of trust was properly foreclosed. Accordingly, Monterey's claim against Lawyer's Title based on the 1970 deed of trust must fail.

We also affirm the district court's imposition of civil contempt sanctions against both Fuller and Monterey. See 18 U.S.C. §401. Fuller himself signed the stipulation in Case 88-3018; manipulated the dismissal of that action; and signed the complaint in the present case, knowing that the 1970 deed of trust could not be validly foreclosed.

"'When reviewing the grant or denial of civil or criminal contempt motions, we are limited to determining whether the ruling of the district court amounts to an abuse of discretion.'" Barnes v. Bosley, 828 F.2d 1253, 1259 (8th Cir. 1987) (quoting V.T.A., Inc. v. Airco, Inc., 597 F.2d 220, 226 (10th Cir. 1979((. We find no abuse of discretion here.

*6 Likewise, we affirm the district court's imposition of sanctions under Rule 11 against Attorney Curran. "We review all aspects of a district court's Rule 11 decision under an abuse of discretion standard." Peerless Indus. Paint Coatings Co. v. Canam Steel Corp., 979 F.2d 685, 686 (8th Cir. 1992). A reasonable investigation would have shown counsel that Fuller and his cohorts were contradicting the stipulation and the court's judgment

of foreclosure and were manipulating the judicial process. Counsel's claim of reliance solely on the language of In re Piper Aircraft does not excuse the filing of the meritless complaint. A fuller understanding of the entire scheme would have shown that In re Piper Aircraft would not support Monterey's attempt to fix liability on Lawyer's title. Thus, we find no abuse of discretion in imposing the $500 fine.

As we find that the sanctions imposed by the district court are sufficient in this case, we deny Lawyer's Title's request to award attorneys' fees and double costs arising out of this appeal.

The judgment of the district court is affirmed in all respects.

FN1. The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

FN2. Some clarification of the relationships between the various

defendants may prove helpful at this point. Geneva Johnson is the wife of Paul Johnson. Ron Johnson is Paul Johnson's son. Paul Johnson and Gary Fuller have been friends and occasional business partners for twenty years and at times have shared office space. The corporate defendants and their officers included the following: (1) Empire Development Corporation: Paul Johnson, President and Director; Gary Fuller, Secretary; Geneva Johnson, Director; (2) Empire Mortgage Company, Inc.: Gary Fuller, President and Director; Geneva Johnson, Vice President and Director; Carolyn Johnson Wood, Director; (3) Southwest Village Water Company: Ron Johnson, President.

(Cite as: 1993 WL 328474 (8th Cir. (Mo.)))

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93-524

Supreme Court, U.S.
FILED
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

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THE LONG ISLAND RAIL ROAD COMPANY,

*Petitioner,*

*vs.*

JOHN BATES, JAMES BUTLER, ANTONIO SALVA, MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49-50 (1974) . . . . . 4, 6, 8

*Alexander and Alexander, Inc. v. Wachovia Bk. & Trust Co.*, N.A., 754 F.Supp. 133, 136 (N.D. Ill. 1991) . . . . . 11, 14

*Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir., 1991), *aff'd after remand*, 975 F.2d 1161 (5th Cir. 1992) . . . . . 7

*Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) . . . . . 13, 21

*Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981) . . . . . 4

*Carey v. Electric Mut. Liab. Ins. Co.*, 500 F.Supp. 1227, 1229-30 (W.D.Pa.1980) . . . . . 12

*Matter of Cassidy*, 892 F.2d 637, 641 (7th Cir.), *cert. denied*,___U.S.___, 111 St. Ct. 48 (1991) . . . . . 10

*City of Kingsport v. Steel and Roof Structure, Inc.*, 500 F.2d 617, 620 (6th Cir. 1974) . . . . . 10, 14

*Continental Cas. Co. v. Armstrong World Industries, Inc.*, 766 F.Supp. 1296, 1299 (N.D. Ill. 1991) . . . . . 11

*Davis v. Wakelee*, 156 U.S. 680, 689 (1895) . . . . . 8

*Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1397 (7th Cir. 1992) . . . . . 10

*Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598, 599 (7th Cir. 1982) . . . . . 10, 14, 15

*Ellis v. Arkansas Louisiana Gas Co.*, 609 F.2d 436, 440 (10th Cir. 1979) *cert. denied*, 445 U.S. 964 (1980) . . . . . 11

*Gibson v. Missouri Pac. RR Co.*, 314 F.Supp. 1211, 1216 (E.D. Tex. 1970), *rev'd on other grds.* 441 F.2d 784 (5th Cir.), *cert. denied*, 404 U.S. 855 (1971) . . 12, 14

*Gilmer v. Interstate-Johnson Lane Corp.*, ___ U.S. ___, 111 S.Ct. 1647 (1991) . . . . . 5, 6

*Kale v. Obuchowski*, 985 F.2d 360 (7th Cir. 1993) . . . 20

*Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980) . . . . . 9, 13

*Long Is. Lighting Co. v. Transamerica Delaval, Inc.*, 646 F.Supp. 1442, 1447 (S.D.N.Y. 1986) . . . . . 12

*McDonald v. City of West Branch*, 466 U.S. 284, 290 (1984) . . . . . 3, 5, 6

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109 (2d Cir. 1990) . . . . . 9, 13, 18

*Scott v. Land Span Motor, Inc.*, 781 F.Supp. 1115, 1119 (D.S.C. 1991) . . . . . 8, 12

*Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, 735 (11th Cir. 1984) . . . . . 10

*In Re United Mine Workers of Amer. Employee Benefit Plans Litigation v. Pittston Co.*, 782 F.Supp 658, 673 (D.D.C. 1992) . . . . . 11

*United States v. 49.01 Acres of Land*, 802, F.2d 387, 390 (10th Cir. 1986) . . . . . 10

*United States v. Levasseur*, 846 F.2d 786, 794-95 (1st Cir. 1988) . . . . . 21

*USLife Corp. v. U.S. Life Ins. Co.*, 560 F.Supp 1302, 1304-05 (N.D. Tex. 1983) . . . . . 11, 20

*Universal City Studios, Inc. v. Nintendo Co.*, 578 F.Supp. 911, 921 (S.D.N.Y. 1983), aff'd, 746 F.2d 112 (2d Cir. 1984) . . . . . 11, 14

*Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, 958 F.2d 355, 359 (Fed. Cir. 1992) . . 14, 21

*Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 666 (Fed. Cir.), *cert. denied*, 488 U.S. 968 (1988) . . . . . 14

*Young v. United States Dept. of Justice*, 882 F.2d 633, 639-40 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990) . . . . . 12

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE LONG ISLAND RAIL ROAD COMPANY,

Petitioner,

vs.

JOHN BATES, JAMES BUTLER, ANTONIO SALVA and MALACHY LYONS, JR., individually and on behalf of all others similarly situated,

Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## INTRODUCTION

Respondent Malachy Lyons, Jr., submits this brief in opposition to the petition by the Long Island Rail Road for a writ of certiorari to the United States Court of Appeals for the Second Circuit, which petition is brought on the grounds that (1) the

District Court lacked subject matter jurisdiction and (2) respondent Lyons is judicially estopped from maintaining his action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

The petition should be denied, as petitioner has failed to present any "special and important reasons therefor."

## POINT I

## PETITIONER IS INCORRECT IN CLAIMING THAT THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

Petitioner argues that the District Court lacked subject matter jurisdiction because "respondents' Rehabilitation Act claims turn on the provisions of their respective collective bargaining agreements" and, as such, "constitute 'minor disputes' under the RLA" (Railway Labor Act), which "must be resolved through arbitration" (Pet.,

pp. 37-38).

Petitioner has pointed to no case that would warrant dismissal for lack of subject matter jurisdiction. In McDonald v. City of West Branch, 466 U.S. 284, 290 (1984), the Court unanimously held that, in an action brought pursuant to 42 U.S.C. §1983, res judicata or collateral estoppel effect should not be given to an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement. The synopsis of the Court's holding states, in pertinent part, as follows (466 U.S. at 284):

> Although arbitration is well suited to resolving contractual disputes, it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that §1983 is designed to safeguard. As a result, according preclusive effect to an arbitration

> award in a subsequent §1983 action would undermine that statute's efficacy in protecting federal rights. This conclusion is supported by the facts that an arbitrator may not have the expertise to resolve the complex legal questions that arise in §1983 actions or the authority to enforce §1983; that a union's usual exclusive control over grievance procedures may result in the employee's loss of an opportunity to be compensated for a constitutional deprivation merely because it was not in the union's interest to press his grievance vigorously; and that arbitral factfinding is generally not equivalent to judicial factfinding.

See also, Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737 (1981).

The above-quoted language is equally applicable here, where petitioner seeks to deprive plaintiffs of a federal civil rights statute because of an arbitration brought under a collective bargaining agreement. It should be noted that the

Federal Employers' Liability Act, pertaining to common carriers by railroad (at 45 U.S.C. §58), provides that:

> Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. [Emphasis added].

The mere fact that a Long Island Railroad union employee is subject to the Railway Labor Act's dispute resolution procedures does not preclude such employee from seeking redress under the United States Constitution or under federal statutes such as the Rehabilitation Act of 1973.

It is no answer to say that McDonald v. City of West Branch, supra, is not applicable here by virtue of the Court's subsequent decision in Gilmer v. Interstate-Johnson Lane Corp., ____ U.S. ____,

111 S.Ct. 1647 (1991). In Gilmer, the Court held that a claim under the Age Discrimination in Employment Act of 1956 "can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application" (____U.S. at ____, 111 S.Ct. at 1650); However, McDonald and Alexander v. Gardner-Denver Co. remain applicable for the reasons stated by the Court in Gilmer itself, which we cite at length (____U.S. at ____, 111 S.Ct. at 1657):

> There are several important distinctions between the Gardner-Denver line of cases and the case before us. First, those cases do not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were

> not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA [Federal Arbitration Act], which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." Mitsubishi, 473 U.S., at 625, 105 S.Ct., at 3353. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

See also, Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir., 1991), aff'd after remand, 975 F.2d 1161 (5th Cir. 1992), where the court wrote (939 F.2d at 230, fn.*):

> The FAA's coverage excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged

> in foreign or interstate commerce." 9 U.S.C. §1. In both this case and Gilmer, the arbitration clause was contained in the employee's contract with a securities exchange, not with the employer. See generally Gilmer, 111 S.Ct. at 1651 n. 1 (discussing the exclusionary clause of §1). Courts should be mindful of this potential issue in future cases.

This language further argues in favor of the application of the Gardner-Denver line of cases here to sustain the retention of subject matter jurisdiction.

## POINT II

## THE COURT OF APPEALS PROPERLY RULED ON THE ISSUE OF JUDICIAL ESTOPPEL.

While there is no universally accepted test for the application of the doctrine of judicial estoppel, or estoppel against inconsistent positions in litigation (Scott v. Land Span Motor, Inc., 781 F. Supp. 1115, 1119 [D.S.C. 1991]), an oft-cited definition appears in Davis v. Wakelee, 156 U.S. 680, 689 (1895), as follows:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position. [Emphasis added].

In Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109 (2d Cir. 1990), the court declared that "[t]he doctrine of judicial estoppel...applies only if the party against whom the estoppel is claimed actually obtained judgment as a result of the inconsistent position" asserted in the earlier action (903 F.2d at 114) (emphasis added).

The majority of federal courts that have considered the issue have held that success in the prior proceedings is a prerequisite to assertion of the defense of judicial estoppel. See, Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980) (applying District of Columbia

1980) (applying District of Columbia law); United States v. 49.01 Acres of Land, 802 F.2d 387, 390 (10th Cir. 1986) (rejecting doctrine, but declaring that success in prior action has been recognized by most courts as essential element); Diginet, Inc. v. Western Union ATS, Inc., 958 F.2d 1388, 1397 (7th Cir. 1992); Matter of Cassidy, 892 F.2d 637, 641 (7th Cir.) (court must have concurred in earlier position), cert. denied, ____ U.S. ____, 111 St. Ct. 48 (1991); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598, 599 (7th Cir. 1982); Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 735 (11th Cir. 1984); City of Kingsport v. Steel and Roof Structure, Inc., 500 F.2d 617, 620 (6th Cir. 1974); In Re United Mine Workers of Amer.

Employee Benefit Plans Litigation v. Pittston Co., 782 F.Supp. 658, 673 (D.D.C. 1992) (expressing District of Columbia Circuit's wariness of doctrine); Alexander and Alexander, Inc. v. Wachovia Bk. & Trust Co., N.A., 754 F.Supp. 133, 136 (N.D. Ill. 1991); USLife Corp. v. U.S. Life Ins. Co., 560 F.Supp. 1302, 1304-05 (N.D. Tex. 1983) (noting more widely accepted approach is to require success in prior proceeding); Continental Cas. Co. v. Armstrong World Industries, Inc., 776 F.Supp. 1296, 1299 (N.D. Ill. 1991); Ellis v. Arkansas Louisiana Gas Co., 609 F.2d 436, 440 (10th Cir. 1979) (applying Oklahoma law), cert. denied, 445 U.S. 964 (1980); Universal City Studios, Inc. v. Nintendo Co., 578 F.Supp. 911, 921 (S.D.N.Y. 1983), affd, 746 F.2d 112 (2d Cir. 1984);

Long Is. Lighting Co. v. Transamerica Delaval, Inc., 646 F.Supp. 1442, 1447 (S.D.N.Y. 1986); Gibson v. Missouri Pac. RR Co., 314 F.Supp. 1211, 1216 (E.D. Tex. 1970), rev'd on other grds. 441 F.2d 784 (5th Cir.), cert. denied, 404 U.S. 855 (1971); Carey v. Electric Mut. Liab. Ins. Co., 500 F. Supp. 1227, 1229-30 (W.D.Pa. 1980) (applying Pennsylvania law requiring position to be actually considered and adopted in judicial proceeding); Scott v. Land Span Motor,Inc., supra, 781 F.Supp. at 1119, 1120; cf., Young v. United States Dept. of Justice, 882 F.2d 633, 639-40 (2d Cir. 1989) (contrasting case before it to "situation in which a party has obtained favorable relief with an implicit but misleading representation to a court that he would not subsequently

switch positions"), cert. denied, 493 U.S. 1072 (1990); Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982).

Several courts have held that where the prior judicial proceeding did not result in the judicial body being led astray by the claim or defense there asserted, but resulted in a settlement or a stipulation between the parties, judicial estoppel is not available. Said the court in Konstantinidis v. Chen, supra, 626 F.2d at 939:

> A settlement neither requires nor implies any judicial endorsement of either party's claims or theories and thus a settlement does not provide the prior success necessary for judicial estoppel. [Citations omitted].

In Merrill Lynch, Pierce, Fenner & Smith v. Georgiadis, supra, 903 F.2d at 114, the court, in noting the

absence of a successful result in the prior proceeding, referred to the fact that the prior proceeding "was dismised voluntarily in accordance with a stipulation." See also, Water Technologies Corp. v. Calco, Ltd., 850 F.2d 660, 666 (Fed. Cir.), cert. denied, 488 U.S. 968 (1988); City of Kingsport v. Steel and Roof Structure, Inc., supra, 500 F.2d at 620; Edwards v. Aetna Life Ins. Co., supra, 690 F.2d at 599 (where prior proceeding settled, "position cannot be viewed as having been successfully asserted"); Alexander and Alexander, Inc. supra, 754 F.Supp. at 136; Universal City Studies v. Nintendo Co., supra, 781 F.Supp. at 1120; cf., Gibson v. Missouri Pac. RR Co., supra, 314 F.Supp. at 1216; Wang Laboratories, Inc. v. Applied Computer Sciences,

Inc., 958 F.2d 355, 359 (Fed. Cir. 1992).

In Edwards v. Aetna Life Insurance Co., supra, 690 F.2d at 599, the court wrote:

> If the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted. ...The requirement that the position be successfully asserted means that the party must have been successful in getting the first court to accept the position. Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or the second court was misled is not present. [Citations and fn. omitted].

Applying the above principles to the facts in the case at bar, it is clear that the Court of Appeals correctly found that respondent Malachy Lyons is not judicially estopped from maintaining the present

action for reinstatement and back pay.

The previous action was not successfully concluded in plaintiff's favor in any sense of the word, inasmuch as no jury rendered a final verdict in his favor, no judgment was entered in his favor, and no court placed its endorsement, or relied, on any claim plaintiff made. The FELA action was settled by the parties on September 24, 1985 after a liability verdict had been rendered but before completion of the damages phase of the trial.

The case was settled among the parties, including the defendant railroad and two other defendants, for a total of $98,000, out of which the railroad was to pay only $47,000, and out of that latter amount,

plaintiff was to repay a railroad retirement lien estimated to be between $15,000 and $17,000 (A1486, 1489). In addition, the stipulation of settlement included Mr. Lyons' wife's pending state court action for loss of services and "any accident or claim that may have arisen out of an incident which occurred on October 15, 1985" (A1491), in which Mr. Lyons re-injured himself upon returning to work 13 months after the September 9, 1983 automobile accident in which he was first injured.

The settlement did not provide that any part of the sum was being allocated either to pain and suffering, whether past or future, or to lost earnings, whether past or future. During the two years Mr. Lyons had been out of work prior to the

settlement -- September 1983 through September 1985 -- he lost a total of approximately $114,000 in past earnings, alone (A1026, and see A970-71), far more than the total settlement amount and more than twice as much as defendant contributed to the settlement. Moreover, the settlement clearly did not include compensation for loss of future earnings.

Under these circumstances, it cannot fairly be said that Mr. Lyons was successful in the FELA action such that he should be judicially estopped from bringing the present one.

In Merrill Lynch, Pierce, Fenner & Smith v. Georgiadis, supra, 903 F.2d at 114, the court stated the majority view of the doctrine in no uncertain terms: "judicial

estoppel...applies only if the party against whom the estoppel is claimed actually obtained a judgment as a result of the inconsistent position" (emphasis added). Moreover, the court declared that it does not apply where the prior action "was dismissed voluntarily in accordance with a stipulation" (id.).

Therefore, in order for judicial estoppel to apply, the court in the prior action must have actually adopted the alleged inconsistent position. Without such judicial endorsement, there has been no misleading of the court and no reliance by the court on the inconsistent position. In the present case there was no reliance by petitioner on Mr. Lyons' position in the FELA action, and there also was none by the trial

court.

What the court wrote in USLife Corp. v. U.S. Life Insurance Co., supra, 560 F.Supp. at 1306, directly applies here:

> [T]his Court is of the opinion that a requirement of prior success is well-founded and that it is the better approach. To estop a party from urging a position is an extreme measure which should only be taken where the equities are clearly in its favor. The equities in support of judicial estoppel are substantially increased where the possibility of inconsistent results exists. Accordingly, this Court concludes that prior success should be a requisite for its application [emphasis added].

The cases cited by petitioner at page 49 of its petition, as representing the so-called "true" majority rule are unavailing. In Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993), it was clear that the plaintiff had "prevailed" in the earlier action by having

induced the state court to approve a property settlement in a divorce proceeding. In Wang Laboratories, Inc. v. Applied Computer Sciences, Inc., 958 F.2d 355 (Fed. Cir. 1992), it was said that the party subject to judicial estoppel must first have "obtained a litigation benefit" (id., at 358), which the prior settlement between the parties did not constitute (id., at 359). To the same effect is United States v. Levasseur, 846 F.2d 786, 794-95 (1st Cir. 1988). In Allen v. Zurich Insurance Co., 667 F.2d 1162, 1167 (4th Cir. 1982), the court referred to the successful assertion of a legal position in an earlier proceeding and then stated that the doctrine should be "applied with caution" (id.).

## CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: New York, New York
October 28, 1993

Respectfully submitted,

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